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SUPREME COURT OF THE UNITED STATES.

Brief of Greene for D. C.

OCTOBER TERM, 1897.

No. 196.

THE GREEN BAY AND MISSISSIPPI CANAL COMPANY,

Filed Dec. 9, 1897

Plaintiff in Error,

vs.

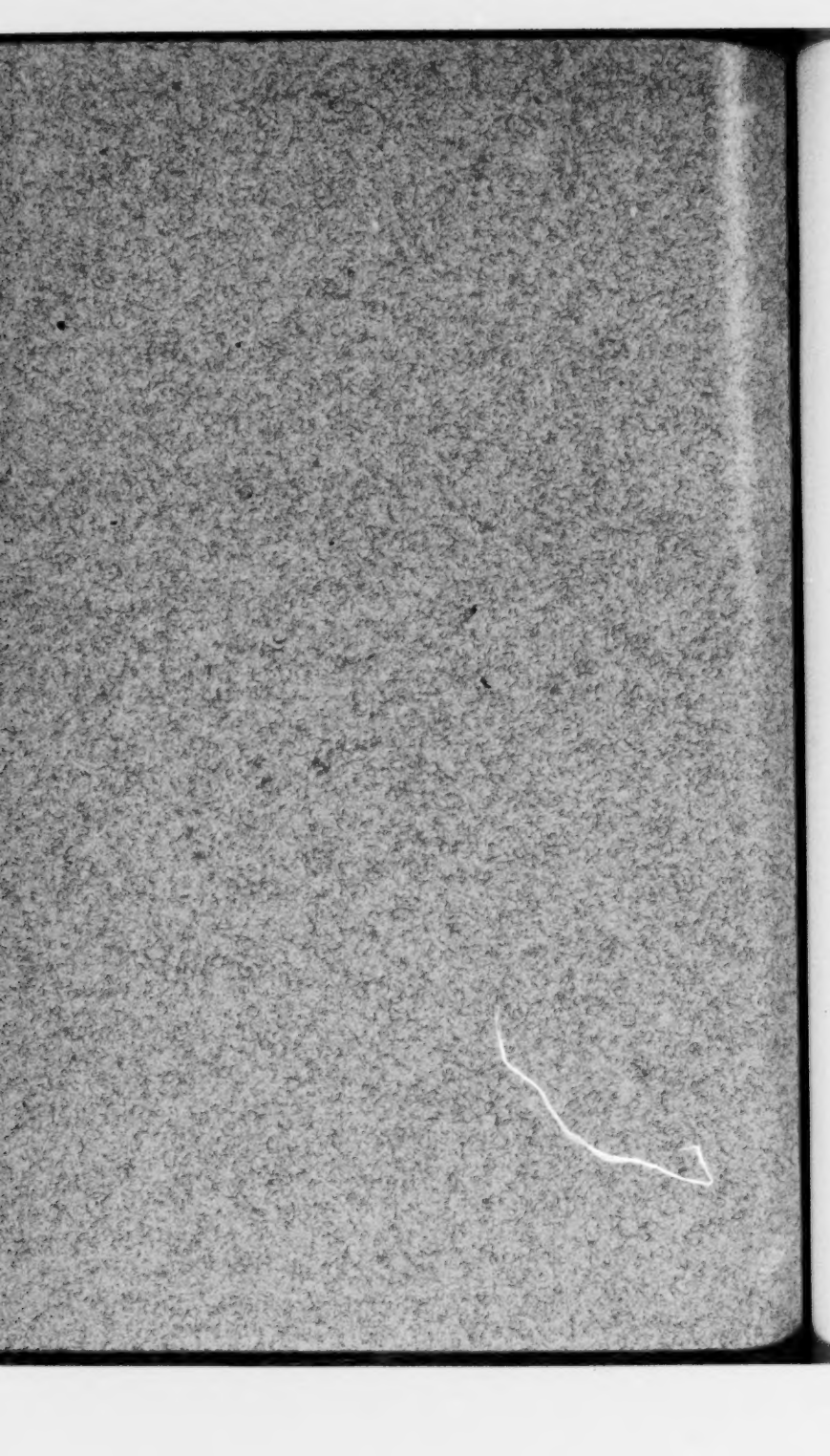
THE PATTEN PAPER COMPANY (LIMITED) ET ALS,

Defendants in Error.

In Error to the Supreme Court of the State of Wisconsin.

BRIEF FOR PATTEN PAPER COMPANY (Limited.)

GEORGE G. GREENE,
Counsel for Defendant in Error.



SUPREME COURT

OF THE UNITED STATES.

THE GREEN BAY AND MISSISSIPPI CANAL COMPANY,
Plaintiff in Error,

vs.

THE PATTEN PAPER COMPANY (LIMITED) ET ALS,
Defendants in Error.

BRIEF FOR PATTEN PAPER COMPANY.

GENERAL STATEMENT.

Fox river, at Kaukauna rapids, is divided by islands into the north, middle and south channels. About 500 feet above the upper island, at the head of the rapids, the government dam across the river feeds the government canal on the north shore with water for navigation. The rapids are a mile and a fourth in length. The canal connects the pond of the dam with slack water below the rapids. Complainants own water powers, due to a fall in the river below the dam, on the middle channel; and, on Nov. 23, 1886, began this suit for partition of the flow among the channels. The bill alleged the flow by nature in the several channels; that plaintiff in error owned the north shore of the river, and the Kaukauna Water Power Co.—herein called the power company—its south shore, from the government dam to below the head of the middle

channel; that the power company was then taking, for power, one-half of the flow of the river from the pond to below the head of the middle channel, by a canal on its land; and that plaintiff in error was then taking, or claiming the right to take, for power, the other half of such flow from the pond to below such head, by the government canal. The bill prayed decree of "what share or proportion of the *entire natural flow*" of the river "is appurtenant to, and *of right should be permitted to flow* in, the south, middle and north channels of said river" (Trans. 34).

Plaintiff in error by cross bill set forth its riparian title and certain legislation of Wisconsin, and prayed that the partition of the flow by the decree "be subject to the *right* of" plaintiff in error "to use *all* of the water power created by said government dam, *on its own lands*, on the north side of the river or elsewhere as it shall see fit," and "be confined to such part of the river, if any, as shall not be so used and *shall be permitted* to flow in the channel of said river below said dam" (Trans. 101). The answer of the power company to the cross bill denied that plaintiff in error "has any lawful right to divert, down said government canal past" its land, "*any* of the water of said river, except for navigation" (Trans. 163, 164). Complainants in reply to the cross bill denied that plaintiff in error had "*any* right to use or utilize said water power, or *any part thereof*, save at said dam, or within such proximity thereto as not to *impair* or destroy any water power created by a fall in said river below said dam" (Trans. 153). Like denials were made by all defendants who answered (Trans. 173, 183.)

On the trial, the parties agreed on the natural

flow in the several channels (Trans. 492). The only issue left was that made by the claim of the cross bill, of right in plaintiff in error to divert the *whole* flow of the river past the land and water powers of defendants in error, and their denials of the right to so divert *any* of such flow. The judgment of the trial court determined this question thus: "The" plaintiff in error "is not obliged to permit *any* of the water of said river or pond to flow over the dam, but is entitled to withdraw from the pond made by said dam *all* of the surplus water not necessary for navigation, either through the canal extending from the pond to slack water below the rapids, or directly from the pond, and use the same from said canal or pond * * wherever it may be available for water power" (Trans. 195). The judgment determined the natural flow agreed upon in the several channels, but declared that plaintiff in error need not permit any of such flow.

Defendants in error appealed from the whole of this decree, except the part fixing the natural flow, and specifically from the ruling which "limits the *amount* of water so apportioned" to the channels to that which plaintiff in error *permitted* to flow (Trans. 532, 536). The state supreme court reversed the decree and ruled that the water, in the use of the water power created by the government dam, must be returned to the stream in such manner and place as not to deprive defendants in error of its use; and that defendants in error had a right to its use, except that needed for navigation, as it was wont to flow by nature, without material alteration or diminution. The court below was directed to enter judgment in accordance with the opinion. Motion for rehearing was denied

and judgment entered by the trial court pursuant to the opinion. On application for such judgment, plaintiff in error moved to amend its cross bill. The motion was denied. Plaintiff in error appealed from the second judgment of the trial court. The supreme court dismissed the appeal, on the ground that the judgment was in accordance with its direction, and denied a motion to reinstate the appeal (Trans. 543-546, 549, 578, 593). The record does not show that any federal question was ever presented in the state court.

We contend:

I. This court has no jurisdiction.

II. Plaintiff in error has no right to divert from the land or water powers of defendants in error, any of the water of the river for power.

Upon the second proposition these facts are material: the goverment canal and dam were built by the state. The law providing for their construction declared that the water power created by them should belong to the state. §16, L. Wis. 1848, p. 58. The improvement and water power were transferred from the state to plaintiff in error. In 1872, plaintiff in error deeded the improvement and appurtenances, *except the water power*, to the United States. It still owns the excepted water power. Its land, over which it discharges water from the canal for power, extends from about 1000 feet below the government dam and 600 feet above the head of the middle channel to about 900 feet below such head (Ex. A-1 Trans. 384). Prior to this suit it leased for such use but 330 horse power.

The total flow of the river is more than 150,000 cubic feet per minute, of which only 1000 cubic feet per minute is used or needed in the canal for

navigation and that only in the season of navigation (Trans. 341, 404, 434-436). The diversion of water through the canal for power, by increasing the current and lessening the depth of its water, is injurious to navigation (Trans. 343, 344, 392). The whole power created by the dam may be used at or near it, on either shore, so that the water used may pass down the channels as by nature (Trans. 364, 434).

The fall over the government dam is about 9 feet. From the foot of the dam, to the foot of the rapids the fall is about 42 feet; to the head of the middle channel about 10 feet; and to the foot of complainant's dam thereon about 18 feet. The total flow gives 300 horse power per foot fall—2700 horse power at the government dam and 12600 horse power below it. Its value is $50 per horse power (Trans. 336, 341, 435, Ex A-1).

Complainants dam on the middle channel was built in 1879. They and other defendants in error have expended large sums of money in improvements of the water powers on the three channels. The rapids, at the point of these improvements are not navigable (Trans. 340, 341).

I.

This court has no jurisdiction.

The alleged ground of its jurisdiction is that the decree of the state court "is against" a "right, title, privilege or immunity, *specially set up or claimed*" by it under the federal constitution, within section 709 R. S. U. S. The right thus denied is said to be that secured by the 14th amendment of the constitution, of not being "deprived" of "*property* without due process of law".

The argument for jurisdiction runs thus: Plaintiff in error, *as riparian owner*, has a right, which is property, to use some of the water of the river through the canal for power; no question of the existence or extent of that right was presented to the state court for decision; such right was, nevertheless, denied by the decree that "*all* the water used" by plaintiff in error, in the use of the power created by the dam, "shall be returned to the stream in such manner and in such place as not to deprive" defendants in error "of its use as it had been accustomed to flow past their banks," and that defendants in error "have the right to use the water of said river, except such as may be necessary for navigation, as it was wont to run in a state of nature, without material alteration or diminution" (Trans. 555, 556); therefore, plaintiff in error was deprived of its property without due process of law. Note the fallacies of this reasoning.

I. The decree, if without due process of law, does not contradict the riparian right of plaintiff in error unless, by that right, it *need not return the water used under it as the decree requires.* It must be determined whether plaintiff in error *has* a right, as riparian owner, to use the water without so returning it, before it can be said that a denial of the right deprives of property.

The 14th amendment does not protect against every judgment without due process of law, but only when it "deprives any person of life, liberty or *property.*"

York vs. Texas, 137 U. S., 15, 20.

If, therefore, this decree denies the alleged right, it must be found that there *is* such right, before it can be said that denial of it deprives of property. Subdivision II of division II of this

brief shows that the riparian right to use water for power only exists, under the conditions declared by the decree. This is the conclusion of all of the authorities on the subject.

II. The existence and extent of the right of plaintiff in error, as riparian owner, to use water for power, were presented to the state court for decision.

The supreme court of the state *on demurrer* to the original bill, said that its allegations "would not, if proved, entitle" complainants "to any damages or relief against" plaintiff in error, 70 Wis., 670. This does not go to the *jurisdiction* of the court to afterwards decide that the bill does authorize such relief. And it does not bear upon the question of what was presented for decision, after the cross bill and the reply and answers thereto were filed. The cross bill, as we have seen, claims that plaintiff in error has right to use *all* of the flow of the river for power where it pleases and need not permit *any* of it to run in the channels (Trans. 101). The reply and answers to the cross bill deny that plaintiff in error has "*any* right" to thus divert "*any* of the water," except for navigation (Trans. 163, 164, 173, 183, 153, 155).

Within the issue thus formed, the state court could affirm or deny the claim of either party, in whole or in part, on any ground it deemed sufficient, and with or without conditions. As it had power, under the claim of right to divert *all* of the water unconditionally, to sustain a right to divert *part* of it only, as riparian owner, it had equal power to deny such right, or to deny it save upon the conditions imposed by the decree. The decision that plaintiff in error cannot divert *any* water for power, without returning it

so that it will flow past the land and powers of defendants in error as it was wont, denies the claim of the cross bill and sustains that of the reply and answers in the terms, in substance, in which the claims are stated in such pleadings.

The state court held that the "ordinary rule which governs the relative rights of riparian owners is the rule which governs this case" (Trans. 544, 546). It would be singular, if the court had power to apply the *riparian rule* to the right of plaintiff to divert as grantee of the state, but not as *riparian owner*. Plaintiff in error could not have framed its cross bill to exclude the power. It could not sue to establish its right to divert the whole flow on one theory; and again sue the same persons to establish its right to divert part of the flow at the same place and by the same means, on the same or another theory. "A court of equity requires parties to bring forward their *whole case* and will not (except under special circumstances) permit the same parties to open the same subject of litigation, in respect of matter which might have been brought forward as a part of the subject of contest."

Henderson vs. Henderson, 3 Hare, 100, 115.
Outram vs. Moorwood, 3 East, 346, 355.
Dowell vs. Applegate, 152 U. S., 327.
Story Eq. Pleadings, § 287.

And when that court has jurisdiction of a cause, it will exercise it to make a complete determination of the controversy.

Ober vs. Gallagher, 93 U. S., 199.
1 Spence Eq. Juris., 389, 390.

The state supreme court had jurisdiction of the questions thus presented by the pleadings. That court can "reverse, affirm or modify" a

judgment as to the part appealed from Section 3071 R. S. Wis. The appeals were from the part of the judgment which decided that plaintiff in error could divert from or permit to flow in, the bed of the stream, such part of the flow as it pleased (Trans. 194, 195, 532, 536.)

III. No right under the federal constitution was "specially set up or claimed" in the state court.

The right need not always be set up by pleading. Its denial may be by the judgment challenged for review, in deciding a question not presented by pleadings or proof, so that the right could not have been pleaded. In such cases, it may be set up by motion for new trial or rehearing. R'y Co, vs. Chicago, 166 U. S., 226. But it must be "specially set up or claimed" in *some way. Ita lex scripta est.* The statute does not give jurisdiction when a right is claimed and denied which the constitution really does give or guard, but only when such right is "specially set up or claimed" under the constitution. The provision, under which the claim is made, must be expressly named.

Maxwell vs. Newbold, 18 How., 511.
Brooks vs. Missouri, 124 U. S., 394.
Leeper vs. Texas, 139 U. S., 462.
Bank vs. Balleny, 150 U. S., 85.
In re Buchanan, 158 U. S., 31.
R'y Co. vs. Chicago, 164 U. S., 454.
Oxley Stave Co. vs. Butler Co., 166 U. S., 648.

In *Maxwell vs. Newbold*, the court said: "The *clause of the constitution* * * * should have been specified by the plaintiff in error, in the state court, in order that this court might see what was the right claimed"; and, it might have

been added, in order that the state court might consider and decide the exact question raised on review. In *Oxley Stave Co. vs. Butler Co.*, the court said: "Can it be said that the plaintiffs *specially* set up or claimed the protection of the amendment against the operation of that decree, by simply averring—without referring to the constitution or even adopting its phraseology—that the decree was passed against deceased persons as well as in the absence of necessary and indispensible parties? This question must be answered in the negative, if due effect be given to the words 'specially set up or claimed' in U. S. Rev. Stat. § 709 * * * The words 'specially set up or claimed' imply that, if a party intends to invoke for the protection of his rights the constitution of the United States, he must *so declare*."

The burden is on the plaintiff in error to show that the claim was thus set up. It must appear that it was, affirmatively and clearly, from the record.

Marrow vs. Brinkley, 129 U. S., 178.

Association vs. Kansas, 120 U. S., 103.

Church vs. Kelsey, 121 U. S., 282.

Neither the constitution nor any provision of it is mentioned in the printed record, save in the assignment of errors in this court. That was too late.

Ansbro vs. United States, 159 U. S., 695.

Butler vs. Gage, 138 U. S., 52.

There was ample opportunity to specially set up the claim in the state court. The denials of the reply and answers to the cross bill, of *any* right of plaintiff in error to divert *any* water past the lands and powers of defendants in error, deny its right to so divert as riparian owner. It could

have objected at the trial, or in its briefs and argument on the first appeal, that the court had no power to determine the riparian question, and could have *specially* set up in such briefs and argument that to deny its right to divert, as riparian owner, would deprive it of property without due process of law, in violation of the 14th amendment. The briefs on that appeal are not printed. As they must be filed and contain the only assignment of errors, under the Wisconsin practice, they would seem to be part of the record. If they are, they will show that counsel for each of the defendants in error argued at length, precisely as we argue in the second division of this brief, that plaintiff in error has no more right by riparian title, than as grantee of the state, to divert any of the river's flow from their lands and powers, and that plaintiff in error strenuously combatted the argument, denying the soundness of the ruling of Judge Story in *Webb vs. Mfg. Co.*, 3 Sumner, 189. There was no claim that the question was not involved or that its decision would violate any constitutional right, but rather an invitation to decide it. If the briefs are not in the record it is silent as to any claim of right under the constitution, on the first appeal.

The opinion on that appeal, plaintiff in error now says, deprived it of its property without due process of law, by denying its right to divert as riparian owner. But it made no such claim on the motion for rehearing, or to dismiss the second appeal, or to reinstate such appeal. The several opinions of the state court, by not considering any such question, imply that it was not raised. The only statement in the printed record, of what plaintiff in error claimed in the state court, is

that filed on the motion to reinstate (Trans. 582-590). It claims that the court erred in deciding the riparian question wrongly or at all, and that the trial court erred in refusing an amendment to the cross bill. These claims were made upon a construction of the pleadings, the judgments and opinions of the state court and state statutes of appeal, and upon the propriety of the amendment and general principles of law. There was no claim that any property had been or would be taken without due process of law, and no mention of the federal constitution or of the terms or substance of any provision of it. The case is here without any record of any claim under the federal constitution set up in the state court specially or generally, expressly or by implication; and without any decision by that court of such claim or any federal question.

II.

Plaintiff in error has no right to divert from the land or water powers of defendants in error, any of the water of the river for power.

1. *It has no such right as grantee of the state of the water power created by the dam.*

Consider the significance of the grant of such a right. It takes from riparian owners below the dam, besides other riparian rights, 12,500 horse power of the value of more than $625,000; for they can have no property in a thing the use of which depends on the will of another. It takes their improvements, worth enough to make the whole loss at least $1,000,000. It not only essentially gives plaintiff in error the whole water power at Kaukauna, but of the river; for power is only at rapids, around which are similar canals, where there is the same legislative right. The

value of the power of the water not used or needed for navigation, within the ancient bed and banks of the stream below the dams, is doubtless more than $3,000,000. If, because less than one per cent. of the flow is taken into the canal for navigation, plaintiff in error may divert over ninety-nine per cent. for power at one place, it may at all places. So this *waterway*, needing but a nominal flow for navigation, becomes a huge *mill race* fed at the mill of plaintiff in error for its private use, by the whole flow of the river.

The legislature cannot grant such right. The riparian right of water power is one of a class. Each owner of the bed and banks of a stream "has a right to the reasonable use of the water, as it flows past his land, not interfering with a like reasonable use by those above and below him. One reasonable use of the water is the use of the power, inherent in the fall of the stream and the force of the current, to drive mills."

Head vs. Amoskeag, 113 U. S., 9.
Garwood vs. Ry. Co., 83 N. Y., 400.
Drury vs. Adam, 102 Ill., 177.
City vs. Soden, 25 Kansas, 588.
Kimberly vs. Hewitt, 79 Wis., 334, 337.
Angell on Watercourses, §§ 90, 93, 95.
Smith vs. City, 92 N. Y., 463.
Halsey vs. Ry. Co., 45 N. J. L., 26.

The right exists in *navigable* streams, if its exercise does not interfere with navigation.

A. C. Conn Co. vs. Mfg. Co. 74 Wis., 652, 656.
City vs. Powers, 89 Mich., 94.

It is "private property under the protection of the constitution, and it cannot be taken or its value lessened or impaired, even for public use, without compensation" (save for navigation), "and *it cannot be taken at all for any one's private*

use." *Janesville vs. Carpenter*, 77 Wis., 300. It is qualified in one respect only : It is subject to the use and improvement of the stream for navigation, and hence may be taken therefor by the State without compensation.

Imp. Co. vs. Boom Co., 54 Wis., 659, 675.

Falls Mfg. Co., vs. Imp. Co., 58 N. W. Rep., 257.

Brooks vs. Imp. Co. 82 Me., 17.

It cannot be taken for any *other* public use without compensation.

Smith vs. City, 92 N. Y., 463.

Imp. Co. vs. Boom Co., 54 Wis., 685.

Delaplaine vs. Ry. Co., 42 Wis., 213, 230.

City vs. Soden, 25 Kans., 588.

In the Soden case, where the flow was diverted from water power for city water works, Mr. Justice Brewer said: "Whatever of benefit, whether of power or otherwise, comes from the flow of water in the channel of a natural stream, is a matter of *property*, and belongs to the riparian owner and is protected in law, just as fully as the land which he owns. It *cannot be taken for private use except by his consent*, and for public use only on due compensation."

The powers of eminent domain and taxation agree in that they can be exercised only for a *public* use. Manufacturing is a *private* use that neither power can aid. Neither can any more furnish it with water power than with steam power; any more make dams and canals for it than mills and machinery.

Lewis' Eminent Domain, § 169.

Cole vs. La Grange, 113 U. S., 1.

Atty. Genl. vs. Eau Claire, 37 Wis., 400, 436.

In re Eureka Co., 96 N. Y., 42.

Weisman vs. Douglas, 64 N. Y., 91.

Channel Co. vs. Ry. Co., 51 Cal., 269.
Varreck vs. Smith, 5 Paige Ch., 136.
Parkersburg vs. Brown, 106 U. S., 487.
Ry. Co. vs. Smith, 23 Kans., 745.
Bissell vs. Kankakee, 64 Ill., 249.
English vs. People, 96 Ill., 566.
Sholl vs. German Coal Co., 118 Ill., 427.
Allen vs. Jay, 60 Me., 124.

In *Cole vs. La Grange*, the court said: "The general grant of the legislative power in the constitution of a State does not enable the legislature, in the exercise either of the right of eminent domain or the right of taxation, to take private property without the owner's consent, for any but a *public* object." Manufacturing was held not such an object, and *taxation* to aid it was held void. So *in re Eureka Co.*, 96 N. Y., 42: "The taking of private property for private purposes cannot be authorized even by legislative act, and the fact that the use to which the property is intended to be put, or the structures intended to be built thereon, will tend incidentally to benefit the public by affording additional accommodations for business, commerce or manufactures, is not sufficient to bring the case within the operation of the right of *eminent domain*." "We cannot hesitate in holding that, if the statute under consideration grants power to the city to construct and maintain a dam for the purpose of leasing the water power for manufacturing purposes, it is a power for a *private* and not for a public use, and cannot be upheld." *Atty. Genl. vs. Eau Claire*, 37 Wis., 400, 436. The principle of decision, in the following cases, is the same.

Newell vs. Smith, 15 Wis., 111.
Curtiss vs. Whipple, 24 Wis., 350.
Osborne vs. Hart, 24 Wis., 89.

Dill vs. Roberts, 30 Wis., 178.

Culbertson vs. Coleman, 47 Wis., 193, 200.

The State, then, may take riparian rights for navigation without compensation, and for other public uses with it; but not for water power for private use at all. It could not have built this canal for water power only, and authorized plaintiff in error, for that purpose, to divert water through it from riparian owners below the dam The Massachusetts doctrine, explained in *Head vs. Amoskeag*, 113 U. S., 9, and *Lowell vs. Boston*, 111 Mass., 454, 465, does not support such an exercise of power. The legislation, under which plaintiff in error claims, does not profess to grant any right to divert water for power. It makes no regulations for compensation or mode of user. Plaintiff in error and complainants are not successive owners of unavailable powers. Complainants have an adequate, independent power on their own premises. A grant to another of the right to divert the natural flow that makes this power, for use as power elsewhere, is not the unification of interdependent powers, but the transfer of the independent power of one private party to another for private use.

If the State, for power for manufacturing only, cannot divert the river from riparian owners, into a canal made solely for that purpose can it into one made for navigation ? Plaintiff in error insists that power in the State to divert into this canal that part of the flow of the stream—less than one per cent.—needed for navigation, carries with it, as *an incident*, power to divert the rest of the flow for private use. This is its deduction from the decision that, when the State, by improvement for navigation or other public use, incidentally creates a water power, it owns and

may grant the incidental power.

Atty. Genl. vs. Eau Claire, 37 Wis., 400, 436.
State vs. Eau Claire, 40 Wis., 533.
Canal Co. vs. Water Power Co., 70 Wis., 635.
Water Power Co. vs. Canal Co., 142 U. S., 254.

The fault of the deduction is in assuming that the water power gained by such diversion is *created by the improvement*. The decisions do not import that. In the Eau Claire cases, the water power was *at* a dam authorized to supply a city with water. Had the State authorized a canal to divert water from the pond of the dam for power, to the injury of riparian rights below the dam, the authority would have been for a private use, which the court denied power in the State to grant. In the Kaukauna cases, it was held that riparian owners could not draw water *from the pond made by the government dam*, because, as the control of water *there* is necessary for navigation, its power *there* must be deemed taken for that use. The incidental power was held to be that of the surplus water *at the dam*; it was *not* held to include also power made by opening the walls of the canal and diverting such surplus from the bed of the stream, below the dam. The latter question was not involved on the facts; and was expressly excluded from consideration. 70 Wis., 635. The logic of the decision, however, proves that this incidental power is only *the power of the surplus water, not used for navigation, at the improvement which intercepts the flow of the stream to raise a head for navigation.*

The dam and canal are for *navigation*. The dam is necessary to raise a head to feed the canal with water for that purpose. All riparian rights taken to gain such head are, therefore, taken for navigation, and their owners have no right to

compensation. Nor can such owners share in the use of the head thus created; primarily, because it is necessary for navigation that the head should be managed in its interest and, hence, taken for its use; incidentally, because the State bears the whole cost of gaining the head. But an insignificant part of the head can be used in the canal for navigation. To secure that use against any contingency, the State takes and owns the surplus. What can the State do with that surplus? The decisions say: "As there is no need of the surplus water *running to waste*, there was nothing objectionable in permitting the State to let out the use of it to private parties." 142 U. S., 254. "The surplus water need not run to waste." 37 Wis., 400, 436. The *place* where this surplus may thus be used for power is where, as the improvement is normally made for navigation, *it would run to waste if not so used.* That is at the dam. No right to divert from owners below the dam, by using the surplus from the canal for power, can result from the necessity of controlling the pond or head in the interest of navigation. That necessity is completely satisfied by excluding all interference with the pond or head, save by the State or its assigns. The owners of powers, made by a fall below the dam, do not draw water from the pond, or in any way interfere with it or the head. Their powers are not gained by the improvement, or at the cost of the State; and use of them can affect the management or use of any water for navigation. Use of water for power from the canal does not help, but hurts navigation. All the purposes of navigation are attained by a dam to feed the canal with enough water for that use, leaving the surplus to be used at the dam. The power of the fall there is all the

State can take or grant: for it is all it can possibly need to use or control for navigation. That is the "incidental water power;" and the State, or its grantee, owns and may use it as a *riparian owner* only.

The conclusion thus drawn from the reasoning of the Kaukauna and Eau Claire cases, and from reason, is sustained by all direct authority.

Varrick vs. Smith, 5 Paige Ch., 136.
Cooper vs. Williams, 5 Oh., 392.
Buckingham vs. Smith, 10 Oh., 288.
Smith vs. City, 92 N. Y., 463.
City vs. Soden, 25 Kans., 588.
Druley vs. Adam, 102 Ill., 177.
Lewis' Eminent Domain, § 169.
Angell on Watercourses, §§ 469, 471.
Gould on Waters, § 212 *et seq.*
Kaukauna Water Pow. Co. vs. Canal Co., 142 U. S., 254, 273, 275.

In *Varrick vs. Smith*, the first syllabus is: "Where a dam is erected upon an ancient stream, to obtain a head of water for the use of one of the State canals, the surplus waters of the stream not wanted for public use, and which continue to flow over the dam and down the ancient stream, cannot legally be diverted, by a lease of the surplus waters of the canal, to the injury of the owners of mill privileges in the stream below the dam." 5 Paige Ch., 137. Chancellor Walworth said: "Complainant is clearly entitled to restrain the defendant Smith from diverting the water which naturally flows over the dam, and *which is not wanted for any public purpose*, from its natural course down the original bed of the river; whereby the mills and mill privileges of the complainant situated below the dam and upon his own premises, may be injured. * * * A head of

water being created for the legitimate purposes of public improvement, no one has a right to tap the State dam, so as to draw off any portion of the artificial pond, without the consent of the legislature or its legally authorized agents. * * * But whatever remains of the stream, beyond what is wanted for the public improvement, and which continues to flow over the dam and down the original channel of the river, unquestionably belongs to the owners of water rights upon the margin of the stream below, in the same manner as if the State dam had not been erected" (p. 158). The Supreme Court of Ohio decided: "Although the law authorizes them [canal commissioners], in some cases, to dispose of the water for hydraulic purposes, with a view to raise a revenue to aid in defraying the expense of this work, still this relates only to the water which is *necessary* for *the navigation of the canal*, and which can be used for these other purposes *without interfering with that navigation.* It does not authorize them to receive a surplus quantity of water into the canal, that they may dispose of it; especially when an injury should thereby be done to an individual. Private property can only be taken by the government or its agent when necessary for the public welfare. * * * *A riparian proprietor possesses the same right to the use of the water flowing through his land that he does to the land itself.* * * * As the public welfare does not require that any more should be withdrawn from the river than is necessary for the navigation of the canal, *no more can be taken*; and should an attempt be made to take more, this court might prevent it by injunction." *Cooper vs. Williams*, 5 Oh., 391. The same court, in a later case, said: "The State, notwithstanding the sovereignty of her character.

can take only sufficient water from private streams for the purposes of the canal. So far the law authorizes the commissioners to invade private right as to take what may be necessary for canal navigation, and to this extent authority is conferred by the constitution. * * * The principle is founded on the superior claims of a whole community over an individual citizen; but then, in those cases only where private property is wanted for *public* use, or demanded by the public welfare. We know of no instances in which it has or can be taken, even by State authority, for the mere purpose of raising a revenue by sale or otherwise; and the exercise of such a power would be utterly destructive of individual right, and break down all distinction between *meum* and *tuum* and annihilate them forever at the pleasure of the State. * * * The uses of the waters of private streams belong to the owners of the lands over which they flow. * * * *They are as much individual property as the stones scattered over the soil.* * * * It follows, if such waters should be taken by the State *for the mere purpose of creating hydraulic power, and rented to an individual*, the transaction would be illegal, and no title would pass as against the owner." *Buckingham vs. Smith*, 10 Oh., 288, 296. In *Smith vs. City*, 92 N. Y., 463, the court thus accurately distinguishes between the sovereign right of navigation, such riparian rights as the State may own in its aid, and the right of eminent domain for other uses than navigation: "Those rights [to control navigation] are quite distinct from such as the State would have possessed as riparian owner. Such rights [riparian] would have entitled her to the same uses and subject to the same liabilities as other owners of

property (authorities). We have before seen that the sovereign right [navigation] grew out of and was based upon the public benefit in promoting trade and commerce, supposed to be derived from keeping open navigable bodies of water as public highways for the common use of the people. We have also seen that they [uses for navigation] constituted an easement over the lands of riparian owners for limited purposes, and *embracing no right to convert the waters to any other uses than those for which the easement was created.* It is an elementary principle that all easements are limited to the one purpose for which they were created, and their enjoyment cannot be extended by implication. This right [navigation], being founded upon the public benefit supposed to be derived from the use as a highway, cannot be extended to a different purpose *inconsistent* with the original use. The *diversion of these waters* for the purpose of furnishing the inhabitants of a large city with that element for domestic use, and *especially to lease them for manufacturing* and other purposes, *is an object totally inconsistent with their use as a public highway or the common right of all the people to their benefits*" (p. 483—4). Angell says: "Although in conducting the water to the canal through a feeder, the State agents must necessarily exercise a discretionary power, yet the water can only be taken by them for *canal purposes*; and if taken and rented to an individual, no title would pass against the riparian owners entitled to it by law." (Watercourses, § 468.) "It [statute] does not authorize them [commissioners] to receive a surplus quantity of water into the canal, that they may dispose of it; for the reason that private property can only be taken by the legislature or its agents *when necessary for the public*

welfare." (Watercourses, § 471.) Lewis on Eminent Domain: "Canals to be used as highways by water are a public use. But *more water cannot be taken than is necessary for navigation*, for the purpose of selling it to private individuals for power or other use" (§ 169).

It is said: If the State had built a series of dams with locks, across the rapids from their foot to their head—dams above dams, "in gay theatric pride"—so as to make navigable basins between them, all water powers on the rapids would have been legitimately taken by *submersion*; hence they have been so taken by *diversion*. It will not do to say that what *may* be done *has* been done. The decision of the State to make the improvement by the series of dams supposed, would, probably, be conclusive of its necessity. The powers flooded by each dam would be taken for navigation, as the powers above the present dam are taken. But the improvement, *as made*, demonstrates that diverting the flow from powers below the dam through the canal for water power, does *not* take for navigation, but for an inconsistent private use only.

The legislature did not intend to divert the flow of the river for water power. The act of 1848 is entitled, "An act to provide for the improvement of the Fox and Wisconsin rivers, and to connect the same by a canal." Gen. L. 1848 p. 58. The object is declared to be "to make such streams *navigable*" (Sec. 5). The board of public works is authorized to take such "lands, waters and materials" for "*such* works of improvement" as it deems "necessary" (Sec. 15). Section 16 provides: "Whenever any water power shall be created, by reason of any dam erected, or other improvement, on any of said rivers, such water

power shall belong to the State." This must be construed in view of the object of the act, and, if possible, to make it valid. Thus construed, the water powers reserved must be restricted to those created by dams or other improvements made *for navigation*; and not to include those created by special adaptation of such improvements to divert water from the stream for a different and inconsistent private use. Rationally and literally, the words used will bear that construction, and no other. Power obtained by opening the wall of the canal, and diverting the flow from the river through the breach, is not *created* by a dam or improvement *for navigation*. The wall of the canal must be tapped; and its water must be diminished in depth and increased in current injuriously to navigation. If the use for power is much, the plan and capacity of the canal must be adapted to it. The fall thus obtained from the canal is largely gained by the fall in the bed of the stream below the dam. It is straining words beyond their strength, and against the purpose and validity of the act, to say that such a water power is created by *an improvement for navigation*.

By our construction it may be said, the only water power reserved to the State is that created by *dams*; whereas, the act also reserves to it powers created by *other* improvements. But the water *used* in the canal *for navigation* may, and often does, afford power. Such power is created in part by *other* improvements than dams; by the canal, locks and basins. It need not run to waste. The reservation must be confined to the power of water, the use or control of which is taken *for navigation*, whether at the dam or in the canal or basins. It was so held by the Su-

preme Court of Ohio, where the act authorized the *lease of surplus water from the canal.* "This relates," the court said, "only to the water which is necessary for the navigation of the canal, and which may be used for other purposes without interfering with that navigation. It does not authorize them to receive a surplus quantity of water into the canal that they may dispose of it." *Cooper vs. Williams*, 5 Oh., 392. *Buckingham vs. Smith*, 10 Oh., 297.

It is argued: There is a difference of level between the water in the canal at the lots of plaintiff in error and the water in the stream there; *this difference of level is water-power created by an improvement for navigation*; hence the taking of riparian rights by the use of such power is for navigation. The fallacy is plain. The difference of level between two surfaces of water is not water power. That which causes such difference does not create water-power. To constitute water-power there must be, besides a dif ference of levels, an actual fall between the levels, or *the right to cause such fall.* A river makes great bends around narrow strips, with much difference of level in the water of the river on the different sides of the strips. The owner of land on such a strip has no water-power, unless he has the right to cause the water of the river to fall across the strip between the levels; and he has no such right as against other riparian owners, who would be injured by the diversion. Had this canal been built to the first lock by a private party on his own premises, he would have had no water-power by reason of the difference of level between the water in the canal at the lower end and in the river. One has an actual water-power when there is an ac-

tual fall of water which he may use. He has a potential water-power when there is a difference of levels between which he may cause and use a fall of water. The canal creates no actual water-power; and no potential water-power, unless the government has the right to cause the water to fall from the level of the canal to that of the river for power. If the government cannot connect the levels by a fall of water, there is no water-power; and it cannot thus connect them if it will thereby take private property solely for the private use of manufacturing.

That the canal for a thousand feet from its head is partly in the bed of the stream, is accidental to the question; is the use for which it is claimed complainant's property has been taken for *navigation or manufacturing*? The *use* would be the same if the canal were a rod or ten rods further on the land. It is equally immaterial if the inner wall of the canal to the first lock is termed "dam." Nevertheless, the use claimed by plaintiff in error diverts the river's flow around complainant's water-powers to their destruction. Nevertheless, that use is for manufacturing only. Nevertheless, it is inconsistent with and injurious to navigation. No juggling with things or epithets can make out that property is taken *for* navigation, by a use *adverse* to it, solely for manufacturing.

The use for manufacturing *at the dam* where the stream is stopped to raise a head for navigation, is also *private;* but *it does not take any property.* There is the same flow below the dam whether the water falling over it is used or wasted there. Riparian rights at or above the dam are taken by its construction. Owners of such rights have no substituted interest in the

head, because the enjoyment of such interest might interfere with the control of the pond for navigation. *At the dam*, therefore, there is *an actual water-power* created by the improvement, the use of which harms no one; which must be used by or under the control of the government, or not at all. But there is only *a difference of level* between the canal and river *at the canal company's lots*, equal to the fall at the dam plus the fall below the dam. That difference of level *is* not water power created by the improvement, because to connect the levels by a fall of water for power takes complainant's property for a private use—takes the private water-power of one to make a private water-power for another; which cannot be done.

When a taking *is* for a public use, the *necessity* of taking is, within limits, a legislative question. Whether more land is taken for a railroad depot ground than is needed, will not, in general, be considered by the courts. But the courts must always say whether the taking *is* for a public use. The State cannot take property for a shoe factory or distillery in aid of a railroad, on its decision that the property is necessary to the public use. The question in such cases relates to the character of the taking rather than the necessity of it. Here, it is a matter of simple demonstration that the taking of complainant's property, by the use of water from the canal for power is neither necessary for navigation nor *for navigation at all*. It is, confessedly for the private use of manufacturing only, and can not possibly affect navigation, save to injure it.

The canal was *planned*, it is said, to divert surplus water down it for power. What the state could not take or grant, it could not get by

planning. But it made no such plan. Its plan was of a dam to feed a canal for navigation, over which dam the surplus water could run, and a canal, over whose walls it could not run. Property was taken for such structures only. When the improvement vested in a private company, it bought land between the canal and river. Its intent or *plan*, to take water from the canal over the land for power, gave it no right to do so. As against other riparian owners, it took, by its purchase, only the rights of the riparian owner from whom it bought.

If the State had the power and intended to take complainant's riparian property for water power, it has never done so. Riparian property cannot be taken for any public use except navigation until compensation is provided.

City vs. Carpenter, 77 Wis., 288.
Smith vs. City, 92 N. Y., 463.
City vs. Soden, 25 Kans., 588.
Varick vs. Smith, 5 Paige Ch., 136.
Buckingham vs. Smith, 10 Oh., 288, 297.
Halsey vs. Ry. Co., 45 N. J. L., 26.
Lowell vs. Boston, 111 Mass., 454.
Lewis' Eminent Domain, § 183.

No valid law of the State ever provided it. *Canal Co. vs. Water Power Co.*, 70 Wis., 635. In 1875, congress made the United States liable for property "flowed or injured" by "any part of the works of improvement." February 1, 1888, it repealed the provision (18 U. S. St., 596; 25 U. S. S., 21). Unless it gave compensation, it has never been provided. Did congress intend, by that act, that the government should pay all damages to riparian property caused by the diversion of the stream through the canal for private use? It would have been a singular purpose. The gov-

ernment had just paid $145,000 for the improvement except the water power, which was valued at $140,000 (Canal Co. Doc., pp. 72, 73). It would take pretty plain words to fix the intent of congress to make the government pay several millions of dollars more in aid of the excepted water power. No such intent is expressed; nor can it be inferred by any rule of construction. The government is made liable for property "flowed or injured" by "the works of improvement." Complainant's property is not "flowed." It is "injured" by the *diversion*; but that is not by the "works of improvement." The diversion is no part of such "works," and is not caused by them. The "works of improvement" are for navigation; the diversion is for an inconsistent private use.

II. Plaintiff in error has no right as riparian owner, to divert water from complainants for power. As such owner it owns 2,700 horse power at the government dam, and the power appurtenant to its lots. By that title, it cannot divert any of the flow of the stream from the dam to the lots, to the injury of other riparian owners. It cannot do that for its private use, although it owns the north shore from the dam to the lots; for the owners of the opposite shore and islands are equally entitled to the flow for *their* private use.

Angell on Watercourses, §§ 100, 101.
Gould on Waters, § 215.
Webb vs. Mfg. Co., 3 Sumner, 189.
Pratt vs. Sanborn, 2 Allen, 275.
Van den Berg vs. Van Bergen, 13 John. 212.
Harding vs. Water Co., 41 Conn., 87.
Parker vs. Griswold 17 Conn., 287.
Blanchard vs. Baker, 8 Greenl. 253.

Moulton vs. Water Co., 137 Mass., 163, 166.
Trustees vs. Haven, 11 Ill., 554.
Corning vs. Factory, 40 N. Y., 191.

This doctrine has been challenged at the bar, on the ground that it is the same to the owner of one shore, whether the opposite owner uses his share of the flow directly from the stream, or diverts and uses it elsewhere. Perhaps I am unduly inclined to the doctrine, by the eminence and unanimity of the authority that sustains it. It was held by Judge Story in a case that, so far as I know, is approved by every decision and text book that refers to it. It might well be urged, that the soundness of a rule thus fixed by precedent is unassailable.

Gould says: "As each proprietor has no exclusive title to one-half or any definite part of the water flowing past his land, he cannot claim the right as against any other proprietor to divert or sever a proportionate part of it." (Waters, § 215). Again : "The proprietors have no property in the flowing water, which is *indivisible* and not the subject of riparian ownership." (Waters, § 204). "Each riparian owner," says Angell, "is entitled, not to half or other proportion of the water, but *to the whole bulk of the stream, undivided and indivisible*, or *per my et per tout*" (Watercourses, § 100). The language of each of the decisions above is substantially the same.

The basis of the rule is a self-evident fact. The "bulk of the stream" is not the same when a portion of it is diverted, as it is when the same portion is used in the stream. While there must be a division of the flow in its use for power ; still, if the division occurs only in the use in the stream, its bulk is unimpaired; but if the division takes the water out of the stream by diversion,

its bulk for the distance of diversion is diminished. Riparian rights, especially of water-power, depend on the *bulk of the stream.* The depth and velocity of water on one side of the center are greater when the flow on the other side is used there, in the stream, than when an equivalent of water is permanently withdrawn from the stream. If the owner at one end of a dam diverts half the flow around it, he reduces the falling volume of water across the entire dam. If the diverting owner should place some structure on his half of the dam that would, at all times, force the whole undiverted flow over the other half of the dam, the diversion might not injure. But such contrivance, if possible, would only counteract the diversion *at the dam.* Below it, the undiverted flow would spread over the river's bed, and, for the distance of diversion, the opposite owners would only have the use of the diminished flow to the center. If plaintiff in error diverts half the river's flow down this canal for half a mile, the bulk of the stream for that distance is diminished one half, and the water-powers of opposite owners are correspondingly impaired. This is inevitable, unless the undiverted flow, for the whole distance of diversion, is forced to flow on the opposite side of the center, so as to be of the same depths and velocity there that it would be if there were no diversion.

Besides this, in the instant case, the premises of opposite owners are not co-terminous along the river; and the shores of the middle channel are not opposite the main shores in a riparian sense. If plaintiff in error may divert half the flow around the head of the middle channel, on its land, the power company may divert the other half on its land, provided it does it from below

the government dam; and the middle channel be left dry. To the extent that either thus diverts, the residue of the flow spreads to the three channels, and the flow of the middle and south channels is diminished. As the depth of the water in those channels is less than in the north channel, diversion of one half the flow from the pond to the north channel might prevent any flow in them. It certainly would in the south channel. Moreover, riparian owners below the goverment dam have *all* the rights of such owners, as well as that of power; and these all require the flow to run as it was wont to by nature, save as it is diverted for public use. Only by adherence to the rule we have just considered, can riparian rights below the dam be secured.

It would be immaterial, if true, that plaintiff in error cannot use the power of the dam at or near it, so that lower owners may get their rightful use of the flow below. The very definition of the riparian right requires the use of water so as not to injure riparian owners above or below. If it cannot be so used it is a barren right. No plea of necessity will justify diversion by one to the injury of another. "The necessity of one man's business is not to be made the measure of another man's rights."

Angell on Watercourses, § 99a.
Wheatly vs. Chrisman, 24 Pa. St., 298.
Davis vs. Gitchell, 50 Me., 602.
Hansen vs. Coventry, 10 Barb., 518.

But the power *may* be used at or near the dam (Trans. 364, 434.) That plaintiff in error does not own land for such use on the south shore, and that it would be more expensive on the north shore, do not justify diversion from lower owners. And there is room to suspect that the expense or

difficulty of using the power at or near the dam is not the real motive for using it a half a mile below. Plaintiff in error thereby doubles its power, by gaining the fall in the river below the dam.

III. *Plaintiff in error has gained no right to divert water for power by prescription or estoppel.* This action was begun November 23, 1886. Prior to November 23, 1866, there was no use of power from the canal, save by a lease of 100 horse power made June 3, 1861. Plaintiff in error *could* not get prescriptive right to use more power from the canal than was thus used at the beginning of twenty years next before suit.

Prentice vs. Geiger, 74 N. Y., 341.
Holsman vs. Bleaching Co., 14 N. J. Eq., 335.
Company vs. Bradley, 52 N. H., 86.
Boynton vs. Longley, 6 Pac. Rep., 437.
Carlisle vs. Cooper, 21 N. J. Eq., 576, 594.
Gould on Waters, § 372.

"The party claiming the prescriptive right cannot within the twenty years enlarge the use, and at the expiration of that time claim not only the use originally enjoyed, but that use as supplemented and enlarged within the period of prescription." *Prentice vs. Geiger*, 74 N. Y., 341. Plaintiff in error *did* not get a prescriptive right, as against defendants in error to even the use under the lease of 1861. The water, in that use, was discharged over lot 3, above the head of the middle channel, so as not to diminish its power. One man cannot get the right to destroy another's property, by doing something for twenty years that does not affect it. *Boynton vs. Longley*, 6 Pac. Rep., 437.

Similarly, there is no right by estoppel. By not objecting to that which does not substan-

tially injure his property, a man does not lose the right to object to that which ruins it. Before the suit, plaintiff in error had leased but 330 horse power from the canal. The power leased was relatively insignificant—less than 5 per cent. of the power of the river at the point of user. It was largely discharged above the mouth of the middle channel, and any loss from it could easily be made good by a wing dam (Maps, Ex. A–1).

But there can be no estoppel to assert a legal right or title, by acquiescence, if the *facts* on which the right or title depends were equally known to both parties; nor unless the acquiescence was fraudulent.

Brandt vs. Virginia, 93 U. S., 326.
Kingman vs. Graham, 51 Wis., 232.
Canning vs. Harlan, 50 Mich., 320.
Robbins vs. Potter, 98 Mass., 532.
Steel vs. Smelting Co., 106, U. S., 447.
Powell vs. Rogers, 105 Ill., 318.
Henshaw vs. Bissell, 18 Wall., 255.
Williams vs. Wadsworth, 51 Conn., 277.

The rules are thus stated in *Brandt vs. Virginia:* "There must be positive fraud or concealment or negligence so gross as to amount to fraud. * * * When the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel." Plaintiff in error knew that it diverted water from the stream for power; that there were riparian owners below the dam to whom the water would flow if not diverted; that there was a fall below the dam over which the diverted water, if not diverted, would afford power. It is impossible to mention a *fact*, as to which it could have been misled by any acquiescence of complainants; or how there was any fraud, conceal-

ment or negligence on their part.

But complainants did not acquiesce. Since 1879 they have built dams and mills, in open and manifest reliance on the fall below the dam. They and other riparian owners below the dam have made more improvements upon their water powers than plaintiff in error has; prior to this suit, far more. They did not have to resort to law or force to save an estoppel.

GEO. G. GREENE,
Counsel for Patten Paper Co.

No. 190. 14.

Brief of Hooper for D. C.

Filed Dec. 14, 1897.

JAMES H. McKENNEY

16,321

IN SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 190.

THE GREEN BAY & MISSISSIPPI CANAL COMPANY, (Defendant below.) Plaintiff in Error.

vs.

THE PATTEN PAPER COMPANY, LIMITED, ET. ALS, (Plaintiffs below,) IMPLEADED WITH THE KAUKAUNA WATER POWER CO., ET. ALS., (Defendants below,) Defendants in Error.

Brief in Behalf of The Patten Paper Co., Limited, et. al., Plaintiffs below, Dft's in Error.

MOSES HOOPER.

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The judgment under review determines this important question—Has the title of the riparian owners to the water-power furnished by that part of the Kaukauna Rapids lying below the government dam been taken from them, and vested in the plaintiff in error, the Canal Company, through eminent domain?

The judgment is that it has not.

Whether or not this question is Federal, and whether or not the decision of it is correct, are the only questions presented by this brief.

It is claimed by counsel for the plaintiff in error, the Canal Company, defendant in original suit, and, also, by counsel for its co-defendants in the original suit. that such judgment determines this other important question,—What are the rights of the Canal Company, as riparian owner, on the rapids below the dam?

The Canal Company claims that such rights were not involved in the contention presented by the complaint of plaintiffs in original action, cross-bill of Canal Company, or

answers of its co-defendants to complaint and cross-bill, or reply of plaintiffs to cross-bill—that hence such determination was beyond the power of the Court, and a violation of the 14th amendment: and that such determination was erroneous.

I present no argument or suggestion as to whether or not the judgment under review does determine such riparian rights, or as to whether or not the Court had jurisdiction to determine such rights, or as to whether or not such supposed determination is correct. I do not busy myself about any of those matters, further than to say, that if the judgment under review should be reversed on this account only—that it appears to this Court to determine such riparian rights without jurisdiction so to do, and that hence the judgment on that question should be reversed,—no judgment for costs herein should go against the original plaintiffs. I did not seek such adjudication below, and do not enter the strife to maintain it here. The original plaintiffs are not party to that contention. It cannot be spelled out of their complaint or reply.

ARGUMENT ON MOTION TO DISMISS.

Is the question, whether or not the title of the riparian owners, to the water-power furnished by that part of the Kaukauna Rapids lying below the Government dam, has been taken from such owners, and vested in the Canal Company, plaintiff in error, through eminent domain, Federal?

The claim of the Canal Company to such water-power rests upon the act of Wisconsin, approved August 8th, 1848, accepting the grant of lands and organizing the Board of Public Works, and the act of Congress called the **Compensation Act.**

Section 16 of the Act of Wisconsin declares what property the State assumed to take for public use, in these words :

"Whenever a water-power shall be created by reason of any dam erected or other improvements made on any of said rivers, such water-power shall belong to the State, subject to future action of the legislature."

Section 21 attempts to provide for compensation, in the following words :

"If the damages exceed the benefits, it shall be the duty of the Board to direct the same to be paid out of the fund appropriated to said improvements."

It is well settled that this provision for compensation is inadequate, and, hence, that the act for taking failed. (1)

In 1875 Congress passed the **Compensation Act** providing for a further taking. This act also provided for compensation for what was formerly taken under the State law, in the following words :

"In case any land or other property is now, or shall be, flowed or injured by means of any part of the works of said improvement heretofore or hereafter constructed, for which compensation is now or shall become legally owing, * * * the amount of such compensation may be ascertained, etc."

This court has held that this **Compensation Act** is adequate and may stand in aid of the State declaration of taking. Also, that the two, taken together, authorize the taking of what water-power it was necessary to take for public use. (2)

The claim of the Canal Company herein is that the water-power of the riparian owners on the Kaukauna Rapids, below the Government dam, was taken under this State statute and became, in 1848, the property of the State, and, in 1853, the property of the Improvement Company by grant from the State, and, in 1866, the property of the Canal Company as grantee of Improvement Company under mort-

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NOTE 1—G. B. & M. C. Co. vs. Kaukauna Water Power Co. 70 Wis., 635, 654.
Same 742 U. S., 254, 277.
Jones vs. U. S., 48 Wis. 385, 407.
Sweaney vs. U. S., 62 Wis., 396, 399.
Pumpelly vs. Canal Co., 80 U. S., 166.

NOTE 2—Kaukauna Case, 142 U. S., 254, 277-8.

gage foreclosure; (Pr. R. 87 to 93) and should be, or should have been, paid for by the United States under the **Compensation Act.** The decision was against this claim.

Is this question Federal ?

The elaborate and learned briefs on motion to dismiss make little, if any, mention of any claim of Federal Question arising out of the decision of this branch of the case. It is, however, hinted at in one of them, and, on that account seems to require a reference to the points on which it rests.

The jurisdiction of this Court to review that part of the judgment can rest only upon that clause of section 709 U.S. R. S. in the following words: "Where any title * * * is claimed under * * any treaty or statute of the United States and the decision is against the title claimed."

Is the claim of the Canal Company under the **Compensation Act?**

One provision of that act refers to, and provides for, the taking of property thereunder by, and for, the use of the United States. But, so far, has no relation to the property in question, which is claimed to have been taken by the State in 1848, and to have been vested in the Canal Company in 1866. (Pr R. 87 to 93.) Another provision relates to the making compensation for what had been taken under the State law, and was in words quoted above. It is not pretended that any compensation was ever made for the property claimed. Neither is the claim that compensation is due to anybody. It is rather that some property has been taken under the Wisconsin statutes for which compensation may be, or might have been, had of the United States.

Whatever title the Canal Company has came to the State through the act organizing Board of Public Works. (3)

NOTE 3—Kaukauna case, 142 U. S., 254, 269.
Neuman's opinion Pr. R. 543.
Kaukauna Case. 90 Wis., 370, 399, 402-3.
Cross Bill Pr. R. 87 to 93.

The claim to the property being through the State statute, and the United States statute, so far as concerns this property relating to compensation only, how can the decision denying the claim present a Federal Question ?

But there may be spelled out of the assignment of errors a claim that a Federal Question is raised thus. In the Kaukauna Case (4) this Court declared the right of the Canal Company, under the statute of Wisconsin, to the water-power created by, and at, the dam. The Canal Company now says that by the decision of the State Court in this case, denying its claim to title to the water-power created by the fall of the water in the river below the dam, the State Court has deprived it, the Canal Company, of its rights as adjudicated by this Court. But there is no statute of the United States making such a question Federal. This Court can compel obedience to its judgment in that case. But how can it make the question, whether the decision in that case applies to other property, Federal ? There is no statute making it so. Otherwise this Court would have power to review all judgments, not in harmony with its opinions.

But that decision does not apply to the rights here in contention. Therein, the question was,—Had the water-power company the right to break the bank of, and draw water for power from, the pond held by the government dam ? Herein the question is,—Has the Canal Company the right to divert the water of the river from its bed, and carry it around the mills of riparian owners, on the rapids below the dam ? How different those two claims are will more fully appear in consideration of the latter claim of right upon its merits.

Besides, none of these defendants in error (original plaintiffs) were party to the Kaukauna suit, as is stated in their reply to the Cross Bill. (Pr R. 156.)

THE MERITS.

Issue.

This action was originally brought against the Kaukauna

NOTE 4—Kaukauna Case, 142 U. S., 254 to 282.

Water Power Company and its tenants, to restrain them from diverting plaintiff's (below) portion of the water of Fox River at Kaukauna from the middle channel thereof, and from the mills of the plaintiffs (below) situated on said middle channel. In settling the question of diversion, a determination of the question of the proportionate flow of water by nature, in each, the north, middle, and south channels, became necessary. (5) In order that such determination might be final, it seemed desirable that all riparian owners on these channels should be brought into court, as plaintiffs or defendants. (5) The Canal Company was united in interest in that contention with the plaintiff. It was made defendant, however, because it declined to be a plaintiff. (Pr. R. 31)

The objects of restraining diversion and apportioning the flow have been reached by a decision that no party questions. (Pr. R 191)

But the Canal Company has, by counter claim or cross bill, projected into the case a new question. It is,—**Has the Canal Company the right** to divert the entire **flow** of the stream, for hydraulic power, from the lands of riparian owners situated below the state, or government, dam, and having on them available fall or water power, independent of, and below such dam ? Or, in other words,—Has the title of the riparian owners to the water power furnished by that portion of the Kaukauna Rapids below the government dam been taken from them and vested in the Canal Company ? (Pr. R. 51 to 61, 521-2)

Names.

In referring to the case, Green Bay and Mississippi Canal Company against Kaukauna Water Power Company and others, 142 U. S., 254, I will call it the **Kaukauna Case.** I will also call the Fox and Wisconsin Improvement Company the **Improvement Company;** the Green Bay and Mississippi Canal Company the **Canal Company;**

NOTE 5—This case, 70 Wis., 659, 670.

Chapter 210 Acts of Congress of 1870 the **Arbitration Act;** (See Canal Co. Doc. pp. 60-1-2.) Chapter 416 Acts of Congress 1872 the **Purchasing Act**; (See Canal Co Doc. p. 745.) Chapter 166 Acts of Congress of 1875 the **Compensation Act**; (See Canal Co. Doc. pp. 78-9,) and Chapter 4 Act of Congress of 1888 the **Repealing Act**. (See 25 U. S. Stat. at large 4, 21.)

Facts.

The finding of facts, so-called, made by the trial Judge, are favorable to the contention of the Canal Company. But such findings are not findings of fact. They are remote inferences or conclusions, substantially legal conclusions, drawn from the facts proven. The original plaintiffs are not handicapped by them. The State Supreme Court did not regard them as of any importance as findings of fact. The rule that the trial Judge saw the witnesses, or for any reason, had the advantage in respect to settling the facts, has no place here. Most of the facts,—all the controlling facts—are stipulated. (Pr. R. 331 to 344) There is only one disputable fact or statement, or item of proof, in the entire case on this contention. This disputable fact is merely matter of detail, and seems quite immaterial. (See hereafter in this brief.)

From the conceeded facts the Wisconsin Supreme Court reached certain conclusions, which plaintiff in error claims to be erroneous.

The situation, as shown by the undisputed proofs and admissions, is this.

There is a **fall of fifty feet** in the Fox River at **Kaukauna** in a distance of one and a half miles. (Pr. R. 333-380.)

The **plan of improvement** located on the Fox at this point was adopted by the Board of Public Works in 1851. (Pr. R. 471-2) It was furnished by their engineers, Alton and Anderson and a Mr. Day, a consulting engineer from Pennsylvania. (Pr. R. 471-2-3-348-9-350-1.) This plan was satisfactory to Engineer Jenne also. (Pr. R. 468.) It included a **dam near the head** of the Kaukauna Rapids about

eight or nine feet high, (Pr. R. 342-3, 359-60) a **canal leading down** the north bank of the river from the pond held by this dam to slack water at the foot of the rapids, (Pr. R. 334.) a **guard lock** near the head of this canal, (Pr. R. 472,) and **five lift locks** between the guard lock and the foot of the canal. The combined lift of the five locks was about fifty feet. (Pr. R. 471.) This left a **fall in the river** of about **forty feet below** the foot of the **dam.**

Whether the dam reached the land at the north end, and the mouth of the canal lay entirely out of the river on the land, or the dam only reached a pier or abuttment built in the river bed, and the mouth of the canal lay partly in the river bed and partly out of the river and along the line of north shore, is disputable on the evidence. There is no contradictory evidence on any other point. If the findings show that the mind of the trial judge acted on this question, we accept his finding or conclusion. We pass the question as immaterial.

The upper 1100 feet of this canal lay partly—about half—in the river bed, and partly—about half—north of the north shore of the river. (Pr. R. 334-410.) The earth dug out of the bank to make the north side of this part of the canal was thrown into the river bed to form the bottom of the south side of the canal. (Pr. R. 238-9, 251-2, 291, 307, 323 and the Jenne Maps.)

The south bank of this section of the canal was formed by a heavy stone **retaining wall** (Pr. R. 281-2 and Jenne Maps No. 11) intended to hold back the water at all stages, and not waste or spill any. (Pr. R. 343.)

Below this upper section of 1100 feet there of, this canal lay entirely inland and distant from the north shore of the river from one hundred to one thousand feet. (See Jenne Maps, and Pr. R. 334.)

At a point about twenty-two hundred feet below the mouth of this canal there was a lift lock, and at about eight hundred feet further below a second, and at about three hundred feet further below a third, and at about two hundred feet further below a fourth, and at about fifteen hun-

dred feet further below a fifth. These locks had a lift of about ten feet each. (Pr. R. 334 and the Jenne Maps, sheets 11-12-13.) On the **south shore** of the river an embankment from one to eight feet high was built, running from a point about one thousand feet above down to and including the south dam landing. (Pr. R. 334 and Jenne maps.)

Capacity of Canal. The original plan of this canal provided that it should be "A canal with forty feet width of bottom, banks eight feet high, slopes one and one half to one, or two to one, according to the nature of the materials, and calculated for a depth of four feet at usual low water." (Pr. R. 468-9.)

Martin's contract of 1851 with the State required "That the water shall be forty-four feet wide on the bottom, sixty feet wide at the top water line, and four feet deep at ordinary stages of water." (Pr. R. 351.)

The canal, as constructed, included a **guard lock** near the head of it, and just below the north end of the dam, fifty and one half feet in width. (Pr. R. 281-391,)

When this canal was built the water was not over five feet deep in the canal at the guard-lock. (Pr. R. 466-8, 378.) This remained until after 1859. (See Jenne Maps, No. 11.)

This guard-lock was built by advice of consulting engineer Day, with approval of the official engineer. (Pr. R. 472-3.)

Now there are two openings in place of this guard-lock, each forty feet wide, one 8.68 feet deep, the other 6.93 feet deep. (Pr. R. 392.)

The canal is also of practically the same capacity. (Pr. R. 392-3-4.) This enlargement was made by the United States. (Pr. R. 284-5-6.)

Velocity of water in canal used for navigation should not exceed one hundred feet per minute. (Pr. R. 344-391.) Allowing a flow of one hundred and twenty feet per minute gives the capacity of guard-lock as 24.240 cubic feet per minute at depth of four feet, 30,300 cubic feet per minute at depth of five feet, and 48.480 cubic feet per minute at depth of eight feet. (Pr. R. 592.) Very little, if any, water could

be drawn for power from this canal without materially interfering with navigation, if canal was 44 feet wide at bottom and 60 feet wide at top of water line and water four feet deep at an ordinary stage. (Pr. R. 392-3.) Without regard to navagation, viewing canal as for water power only, there could safely pass through it one fifth of ordinary low water flow. (Pr. R. 393-4.)

Some boats could pass in present canal with draft of 73000 cubic feet per minute through canal. Other boats might require closing of part of wheels. This would call for velocity of 121 feet per minute in narrow part of canal and 93⅓ in guard-lock openings. (Pr. R. 393.) To use all the water of the river from the canal on the upper level, would require the size of the canal to be doubled, (Pr. R. 297.) It might have been built originally, with double its present capacity (being four times its original capacity and enough to carry the whole river on upper level) at about ten per cent additional cost. (Pr. R. 437.)

The flow of the river, at ordinary low stages, is about 150,000 cubic feet per minute. (Pr. R. 341, 391-3, 441.)

The amount of water necessary for navigation was, and is, about 800 to 1000 cubic feet per minute. (Pr. R. 341, 435.)

The **Jenne maps** are a series of maps made by direction of, and for use of, the Improvement Company, through which the Canal Company takes its title. They were made in 1859, from surveys by one Nearing. They are bound in a volume, and this volume has, as its title page, this: "Maps showing the Canals, Locks, Dams and Water-power Lots of the Fox and Wisconsin Improvement Company, surveyed by W. S. Nearing, Assistant Engineer, under direction of Daniel C. Jenne, Chief Engineer, 1859." On its title page is this note: "The red line is the base of survey, the full red transverse lines indicate angles, and the blue line the outer bounds of land appropriated for the benefit and use of the Improvement * * * "

These maps have been, since 1859, in the office of the Improvement Company, its Trustees under trust deed and its successor, the Canal Company. (Pr. R. 337.)

Several of these maps have plats of land showing lots and blocks. Sheet 12 shows the land from the point where the Kaukauna canal leaves the river bed and enters on the main land, north of the river, down to the upper lift lock, to be plated as lots one to twelve, each lot reaching from the canal to the river, and each being one hundred feet wide.

There are also plats of riparian lands at other points showing them divided into lots and blocks. The Improvement Company, and its trustees, and its successor, the Canal Company, in leases, deeds and contracts, described these platted lands by lot and block referring to this set of maps for location of same, which documents have been recorded. (Pr. R. 336-7.)

These maps were also used from time they were made for purpose of description of property by the assessors. (Pr. R. 336-7, 346 and the maps.)

The **blue line** on the south side of the river at Kaukauna includes the embankment 1000 feet or more above the dam, and the south end of the same, and the shore some 250 feet below the dam-landing, and no more. On the north side of the river it includes the north shore, from a point about 100 feet above the mouth of the canal, down about 1100 feet to the point where the canal enters on the main land. From this point to the river, below the rapids, it includes only the canal and basin to feed locks, (Pr. R. 472, and Jenne maps No. 10, 11, 12.) and a strip of land on each side of the same about twenty to one hundred feet wide. It includes none of the islands, nor any of the land on the north shore below the point where the canal enters on the land.

The mouth of the middle channel is over against lot five (5) shown on number twelve of these maps. (Pr. R. 283 and maps.)

The canal and the blue line enter on the main land about six hundred and fifty to seven hundred feet, by the river, above the mouth of the middle channel on which original plaintiffs' mills are. (Pr. R. 283.)

Over against the mouth of the middle channel this blue line lays about one hundred and fifteen feet inland from, and

north of, the north shore, of the north channel. (Pr. R. 283.)

Captain Edwards says of this blue line. "The distinct blue line, pen 'ine, is the claim of the right of flowage and condemnation line as I understand it." (Pr. R. 282.) He was thoroughly familiar with the handling of the Improvement. (Pr. R. 384, 395-6.)

It does not appear that the State or the Improvement Company or its Trustees or the Canal Company ever exercised any acts of ownership over any lands, or water-power appurtenant to any lands, outside of the blue line, otherwise than as riparian owners. Nor does it appear that either of them made any claim to any water-power, appurtenant by nature to any lands outside of the blue line, before the appearance of the cross-bill herein, which was on March 11th, 1890, (Pr. R. 50 to 62,) otherwise than by certain reports hereinafter referred to. At the same time, the Improvement Company, its Trustees and the Canal Company have, since the making of said maps, exercised acts of ownership and control over the lands within the blue line. (Pr. R. 337-8, 340.)

On the other hand, as shown by divers **excerpts** from private and public documents furnished by Mr. Stevens, it appears that, perhaps the Board of Public Works claimed these water-powers for the State (Pr. R. 479); that the Improvement Company, in 1853, in a prospectus issued to enable it to dispose of half a million of its first mortgage bonds, held out to the public that it owned these water-powers; (Pr. 475-6-7-8) but this holding out was through very doubtful and equivocal expressions (Pr. R. 476-7-8-9); that in 1856 the company, in attempting to secure favorable legislation by the State, represented to the legislative committee that it owned these water-powers (Pr. R. 480-1-2); that in 1857 the Improvement Company, in reports of officers to stockholders, claimed that it owned these water-powers. (Pr. R. 483-4-5.)

During all this time the riparian owners were building dams and mills and using water-power like that here in contention, where the lands were not included within the blue lines. (Pr. R. 337-8 and the Jenne Maps 4 and 5.)

At Appleton, the blue line does not include the north landing of upper, or **Grand Chute dam.** (See Jenne maps No. 4.) At that landing the riparian owners have used the water for power, commencing as early as the Improvement commenced, and gradually increasing the use until about 1882, when they used half the flow of the river. They had expended in improvements thereon about half a million dollars, prior to the filing of cross bill herein. First action to restrain such use was commenced in 1892. (Pr. R. 337.)

The blue line does not include either of the landings of the **middle or Grand Chute Island** or **West dam** at Appleton. (See Jenne maps No. 5.) At that dam the riparian owners have used the water for power commencing as early as 1849 on north side, (Pr. R. 337-8) and 1856 on south side and on Grande Chute Island. (Pr. R. 338.) Such riparian owners have continued such use, gradually increasing the use, and expending on canals and mills about one million dollars, before filing of cross bill herein. First action to restrain such use was commenced in 1892. (Pr, R. 337-8.)

At this middle, or Grand Chute Island, or West dam the Improvement Company contracted with riparian owners in 1859 regarding the respective works of improvement of the company and the riparian owners at that point. Such contract was duly recorded. It recognized the rights of the riparian owner to create water-power at the fall at the middle dam, and use and own the same. (Pr. R. 339.)

Subsequently, and as late as 1889, 1891, the Canal Company recognized this title of riparian owners to the power at the middle dam. by purchasing a part of the same and leasing the part so purchased. (Pr. R. 339-340.)

The blue line did not include the Islands at Kaukauna. (See Jenne maps No, 12.) Canal Company was the riparian owner of the half of this water-power furnished at the Meade & Edward's dam, between Islands Nos. three and four. (Pr. R. 38, 64, 331.) It then, in 1881, made a lease of water-power to be drawn from this Meade & Edwards power to the original plaintiff, the Union Pulp Co. (Pr, R. 28, 64, 331.) It then also united with the original plaintiff, the Patten Paper Company, its co-riparian owner, in a lease of

water-power to be drawn from the Meade & Edwards pond, to the defendant, Kelso (now Reese Pulp Company.) (Pr, R. 29-331.)

The blue line did not include the north shore at Kaukauna below the first lift lock. There the riparian owners, as early as 1887, improved the power and expended in such improvement over $190,000 without notice of this claim. (Pr. R. 463-4.) No action has been taken against them. (Pr. R. 464-5.)

Among such riparian owners and users was M. L. Martin, (Pr. R. 337.) who testifies that the riparian owners, himself among them, supposed they owned these water-powers. (Pr. R. 348.)

The value of the improvements at the Meade & Edwards dam, at which are the mills of original plaintiffs, made before commencement of this action, amounts to about $70,000. (Pr. R. 340.)

The **fall in the river below** the dam to various points is as follows :

Down south channel to opposite red mill, -	6.24 ft.
Down north channel to opposite red mill, - -	5.361 "
Down north channel to Kaukauna Paper Co's. mill.	9.795 "
Down north channel to Thilmany's mill, - -	10,02 "
Down north channel to Sash Door and Blind Fact.	10,176 "
Down north channel to Electric Light Plant. -	11.104 "
Fall at Kelso's mill, - - - - -	17.1 "
Fall at Union Pulp mill, - - - - -	16.723 "
Fall at Fox River Pulp mill, - - -	15.815 "
Fall in tail-race of Fox River Pulp mill, - -	6.114 "
Fall at Badger Paper mill, - - - -	17.518 "
Fall at Kaukauna Paper Company's mill, -	18.219 "
Fall at Outagamie Paper mill, - - -	22.889 "

(Pr. R. 359-360-1-2.)

Horse power at Government dam 2500; 50 per cent. more at first lift lock. (Pr. R. 279.)

The river furnishes **300 horse power per foot fall.** (Pr. R. 341.)

Riparian ownerships. In August, 1855, the Improvement Company, grantor of the Canal Company, got title to the undivided half of the land between the United States canal and the north channel, from the point where the canal strikes inland down to the first lift lock; but it claimed title to the whole of this tract until a decision to the contrary. (Pr. R, 333-5, 382-4.) At the same time the Improvement Company bought the north shore of the river, including the canal and twenty feet north of it, from the point where the canal strikes inland up to, and including, the mouth of the canal. (Pr. R. 382-4.) At the commencement of this action, the Canal Company owned the undivided half of the shores of Islands No. 3 and 4, including the Meade & Edwards mill-pond and dam.

The other riparian ownerships, as well as these, appear on map A. 1. (Pr. R. 333.) Riparian ownerships are found to have been, at the commencement of this action, as stated in complaint. Same with leases. (Pr. R. 519.)

Mead & Edwards dam, on which original plaintiffs' powers are situated, furnishes a head of 12 to 18 feet. (Pr R 331,360-1.) On that dam the Patten Paper Company, original plaintiff, owned land, and the riparian title to flow of about 25,000 cubic feet of water per minute for power, to be drawn from the pond held by that dam. This title is good, except as against the claim of the Canal Company, as stated in its cross-bill. The Fox River Paper and Pulp Company holds a lease for fifteen years from March 12th, 1883, of part of same, and had built a mill to use same, at cost of $25,000 before the commencement of this action. (Pr. R. 27-8, 331, 519.)

The Canal Company has **succeeded to** all **the title** of the State and the Improvement Company to the hydraulic power in question. (Pr. R. 335.)

The Canal Company's undivided half of the **seven acre tract** at Kaukauna would, if partitioned, **furnish sites** for mills large enough to use to advantage the full flow of the Fox River under a head of fifteen feet. (Pr. R. 336-279.)

The Canal Company owns, as tenant in common, **land on the islands,** which, if partitioned, would **furnish sites** for mills enough to use "All the hydraulic power of the river appurtenant to those islands," and to the shores of the river adjacent to the islands. (Pr. R. 336.)

There is **plenty of land** on the south shore, immediately below the dam, on which to use the whole flow of the river. (Pr. R 364.) All might be used on the south side within three to six hundred feet of the dam. (Pr. R. 434.) On the north side the same, except that it would be much more expensive. (Pr. R. 434.)

The improvement at Kankauna cost about $100,000 of which about $10,000 was expended on the dam. (Pr. R. 336.)

Building of mills and canals. No improvements were made on this Meade & Edwards power, in whcih original plaintiffs are interested, between Islands No. three and four, until 1879-80. (Pr. R, 27-331.) But between that time and commencement of this action improvements were made thereon including dams, canals, and mills, amounting to about seventy thousand dollars. (Pr. R, 340.) Value of mills, machinery, canals and dams of riparian owners on north shore of north channel, built after commencement of this action, below mills of Canal Company's tenants, amounted, in 1887, to over one hundred thousand dollars. (Pr. R. 340.) At commencement of this suit, mills of tenants of Canal Company, above upper lift lock at Kaukauna, were of value of about one hundred and twenty-five thousand dollars. (Pr. R. 340,) Since commencemeet of suit, such mills have been improved, and rebuilt, and now represent value of about two hundred and seventy-five thousand dollars. (Pr.R. 340.)

After year 1850 there was no improvement for water-power at Kaukauna, except a wing dam and saw mill on north channel of river on what afterwards became lots 6, 7, 8, of Jenne's plat, which saw mill was owned by Geo. W. Lawe, and others, up to about August, 1855, and except such as were made by the Improvement Company, and the Meade & Edwards improvement in which original plaintiffs are interested in 1878-80, and the improvement by the Kaukauna

Water-power Company on the south side of the river, commencing in 1880, until after the commencement of this action. (Pr. R. 333.)

Leases by Canal Company and Improvement Company. On 3rd June, 1861, the first lease was made of water for power at Kaukauna on any improvement now in use. This was made, nominally, by Improvement Company and its trustees to Cord & Gray and Morgan L. Martin and E. S. Martin, but the Martins who were riparian owners of undivided half of the land, were realy lessors and not lessees. (Pr. R. 346, 347, 365.)

The lease was for sixty years, renewable, at rent of one dollar a year, for one hundred horse power. It was cancelled July 1st, 1882. (ibid.) This action was commenced Nov. 3, 1886. (Pr. R. 34.) There then existed leases of water by Canal Company and its grantors at Kaukauna, to be drawn from the canal on north side of the river, to amount of six hundred and fifty horse power, (Pr. P. 365) requiring for fulfillment a flow of about twenty thousand cubic feet of water per minute or one-seventh of the flow. (Pr. R. 341.) But the parties holding the leases were accustomed to use more water than their leases provided for by consent of the Canal Company. (Pr. R. 343,490.)

Cross bill herein was first heard of on March 10th, 1890. (Pr. R. 463.4.) There then existed such leases to amount of eight hundred and eighty horse power, (Pr. R. 365.) requiring for fulfillment a flow of about thirty thousand cubic feet of water per minute, or about one-fifth of the entire flow. But there has been used about seventy-three thousand cubic feet per minute, or nearly half the flow. (Pr. R. 393.) At such times, however, it was necessary that some mills should stop drawing water, that boats might pass them in the canal. (Pr. R. 344-393.)

In state of nature, and also after building of State or U. S. dam, the rapids at Kaukauna below the dam **were not navigable** except that it was possible to push unloaded flat boats up the stream, men getting into the water to push them up. The channel upon the rapids was rocky, winding

and twisting, between, around and among obstructions and very swift. The north channel was dangerous to cross. (Pr. R. 341.)

There has been **no condemnation**, by any proceedings in that behalf, of any of the water power in contention. (Pr. R. 488-9.490-494-5.)

Islands Nos. 1, 2. 3. 4, in Kaukauna rapids were surveyed and patented separately from the main land and from each other. (Pr. R. 333.)

In 1870 Congress passed the **arbitration act** saying "the Secretary of War is hereby authorized to adopt for the improvement of the Wisconsin river such plan as may be recommended by the Chief of Bureau of Engineers" and "that the Secretary aforesaid is hereby authorized to ascertain**the sum, which in justice ought to be paid to the Canal Company**as an equivalent for the transfer of all and singular its property and rights of property in and to the line of water communication *** including its locks, dams, canals and franchises or so much of the same, as shall, in the judgment of said Secretary, be needed; and to that end is authorized to join with said company in appointing a **board of disinterested and impartial arbitrators** ** provided that, in making their award, the said Arbitrators shall take into consideration the amount of money realized from the sale of lands heretofore granted by Congress to the state of Wisconsin, to aid in the construction of said water communication, which amount shall be deducted from the actual sale thereof as found by said Arbitrators. ** That no money shall be expended on the improvement ** until the ** Canal Company shall make and file with the Secretary of War an agreement in writing, whereby it shall agree to grant, and convey to the United States the property and franchises mentioned in the foregoing section, upon the terms awarded by the Arbitrators. It is hereby made the duty of the Secretary of War to transmit to Congress a copy of the report of the Arbitrators, upon which Congress may, at its then present session, elect to take such property upon making an appropriation to pay the amount awarded." (Acts Congress 1870, ch. 210, G. B. & M. Doc. pp 60-1-2.)

The Arbitrators determined that "the sum which ought in justice to be paid" and "the actual value" from which the net proceeds of the lands granted should be deducted meant—"What is the value of the improvement to the Government when taken for the purpose of making the same a part of a through route from Lake Michigan to the Mississippi river?" or "as much as it would cost to build such works at the present time, deducting a reasonable sum for depreciation by wear and decay." (G. B. & M. Doc. p 66)

They further determined the value of the property mentioned and certain personal property in use for completion and preservation "to be $1,048,070, and that the amount of money realized from the sale of lands heretofore granted ** to be deducted from such actual value, is $723,070, leaving a balance of $326,000 to be paid to the ** Canal Company." They further said: (G. B. & M. Doc, p 67)

"And whereas, under the said act, the Secretary of War may, in his judgment, decide that such personal property may not be needed, and that a part of the franchises of the Canal Company, viz: the water powers created by the dams and by the use of the surplus water not required for the purpose of navigation, are not needed, and in order to enable said secretary to pass judgment upon these questions, this board have thought proper to appraise the value thereof. They estimate the value of such water power, and lots necessary to the enjoyment of the same, subject to all rights to use the water for the purpose of navigation as the same is reserved in all leases made by said company, and subject also to all leases, grants and assignments made by said company, at the sum of $140,000, which said sum is to be deducted from the said sum of $325,000, in case said Secretary or Congress shall determine that the said water powers are not needed for public use." They valued the personal property at $40,000. (G. B. & M. Doc. pp 67-8)

By his report of March 8th, 1872 to Congress the **Secretary of War** transmitted this report of the board of arbitrators. In his report he said: "that the personal property appraised by said Arbitrators at $40,000 is not needed for

public use." He is further of opinion that "the franchises of said corporation that are appraised by said Arbitrators at the sum of $140,000 are not required for the purpose of navigation and are therefore not needed. Deducting the above valuations of the property, franchises, etc,, which, in the opinion of the Secretary, are not "needed" within the meaning of that word as used in said act, the valuation of the remaining property, franchises, etc., as found by the said Arbitrators is $145,000." (G, B. & M. Doc. p 73)

He further says "the Secretary has been aided in forming his opinion in this case by the report of Major D. C. Houston, the United States Engineer in charge of the survey and improvements of the Fox and the Wisconsin rivers, a copy of which report is transmitted herewith." This accompanying **report of Major Houston** says: "The water power for which the award is made is a limited franchise as said in the award of the board and is "subject to all rights to use the water for the purpose of navigation." (G. B. & M. Doc. p 69)

It consists of certain water lots indicated in the map accompanying the report and the right to use the water power created by the dams on these lots. This water power is estimated to be equal to 14,000 horse power, distributed as follows according to the testimony of Morgan L. Martin upon whose evidence the award seems to be based (See page 13, testimony on water power.) At Appleton, 5,000 horse power, at Cedars 1,000 horse power, at Little Chute 2,500 horse power, at Kaukauna 2,500 horse power, at Rapid Croche 1,500 horse power, at Little Kaukauna 750 horse power, at other points 750 horse power. ** There is an immense water power in the lower Fox, entirely independent of the works of improvement, part of which has been made available by works of private parties." (G. B. & M. Doc. pp 69-70) This report was introduced as evidence herein. (Pr. R. 335-6.)

This verdict of the arbitrators was evidently based on claim, and proofs, of Canal Company that it owned 2,500 horse power of water at Kaukauna and 5,000 at Appleton. This excludes about 10,000 horse power at Kaukauna below

the dam, by nature appurtenant to the land of other riparian owners than the Canal Company (the Canal Company owned about 2,500 horse power as a riparian owner of the twelve lots between the canal and the river): and also excludes about seven thousand horse power then used by other riparian owners, at north end of Grand Chute dam, and at Grand Chute Island power, at Appleton, and appurtenant by nature to their riparian lands.

Upon receipt of this report of the Secretary of War, Congress enacted, by the **purchasing act** that $145,000 should be paid to the Canal Company for so much of its property as was valued by the arbitrators and judged to be needed by the Secretary of War.

In 1875 Congress enacted the **Compensation act,** providing that "In case any lands or other property is now or shall be flowed or injured by means of any part of the works of said improvement heretofore or hereafter constructed for which compensation is now or shall become legally, owing, —the amount of such compensation may be ascertained in like manner."

In 1888 Congress passed the **act repealing** the compensation act.

The legislation of Wisconsin and United States down to 1880 and the arbitration proceedings, including report of Secretary of War, appear in a small volume entitled "Some Laws and Documents Relating to Hydranlic Power of Fox River," which is stipulated herein to be authentic, (Pr. R. 336.) and which is herein referred to as G. B. & M. Doc.

Contention.

The **cross bill** of the Canal Company raises a question of great importance to the litigants in this case, and to many other water power claimants and users in Fox river valley. It is, Has the Canal Company the right to **divert** the surplus water of the river, not necessary for navigation, from the stream at Kaukauna, and carry the same around lower riparian owners, for the purpose of power? The cross-bill sets up claim of such right, and the facts upon which it is

based. The claim is denied, both by the plaintiffs, and by the co-defendants of the Canal Company.

The claim is based upon section 16 of the act of 1848, organizing the Board of Public Works, and the **compensation act** of Congress, together with the decision of the Supreme Courts of Wisconsin, and the United States, in the Kaukauna Case reported in volume 70 Wis, 635-659, and volume 142 U. S. 254-282.

Argument.

Points.

THE ORIGINAL PLAINTIFFS, DEFENDANTS IN ERROR, CONTEND.

First. That they **have property** in their riparian right to water power, which cannot be taken for private use, nor for public use without compensation.

Second. The water power in contention **has not been, and cannot be, applied to any public use,** nor is it commingled with any public expenditure. **Hence it could not be taken.**

Third. There has **never been any taking** of this property ; **nor any attempt to take** it, except by this cross-bill.

Fourth. There was **never notice** to the owners of a claim that this property was taken, while there was any process, or fund, for compensation.

Fifth. The Canal Company had **estopped itself** from claiming that this water power was taken, before passage of the Compensation act. The United States, not wishing this property, did not take it. Hence the Compensation act does not apply to this property.

Sixth. The **terms of the compensation act** do not apply to this property. Hence there cannot have been any taking. There has been no process or fund for compensation.

A decision that the Canal Company has the right to divert all the water of the river, would take from the riparian owners, at this point, about ten thousand horse power of

water power, admitted to be of the value of half a million dollars, (really worth a million) exclusive of the improvements. (Pr. R. 336.(About as much more power in value, located at Appleton, is involved in this contention.

I

The plaintiffs **have property** in the fall of the river, on their lands, below the government dam, which cannot be taken from them for private use, nor for public use without compensation.

In the Kaukauna case, Justice Brown, delivering the opinion of this Court says: (pp 272.)

"There is no doubt, under the facts of this case, that the owner of lot 5 was entitled to compensation for the land appropriated by the State, in the construction of the dam and of the embankment in front of the lot. To what extent he was entitled to the use of the water-power created by the dam, as against the public, and the other riparian owners, may be difficult of ascertainment, depending, as it does, largely, upon the number of proprietors, the width and depth of the river, the volume of the water, the amount of fall, and the character of the manufacturers to which it was applicable."

And (p 276.) "So far, however, as land was actually taken for the purpose of this improvement, either for the dam itself, or the embankments, or for the overflow, or so far as water was diverted from its natural course, or from the uses to which the riparian owner otherwise would have been entitled to devote it, such owner is undoubtedly entitled to compensation."

In the Same Case, Judge Lyon, expressing the opinion of The State Court, says, (pp 652-653) of a riparian owner, upon a navigable stream. "He has the right to utilize the waters of the river upon his land for any purpose not interfering with the navigation of the stream or the rights of other riparian owners. That the construction of the Kaukauna dam and Improvement by the state, and its appropriation of the water-power thereby created, did take the property of the owner of lot five, and deprive him of his

riparian rights, just mentioned, which are also property, does not seem to admit of doubt or controversy." (6)

Riparian owners upon islands separately surveyed and sold by the United States, have the same rights. In such cases the different channels are treated as separate rivers. (7)

II

There was **no authority to take** the property of the plaintiffs, both because (a) the legislature could not give such authority and because (b) it did not attempt to give such authority.

a. This property can only be applied to private use as water power. Neither the State, nor the United States, nor the Canal Company can make any public use of water power. The use is necessarily private. This contention has no relation to so much of the water as is useful for navigation. That is not private, but public property. Neither has this contention any relation to the water power created by the dam, and so necessarily mingled with the public funds expended in building the dam.

The constutition provides for the taking of property for

NOTE 6—See also Cooper vs. Williams, 4 Ohio, 253.
Kents Com. 11th Ed. Vol. 3, pp. 560-1 also p. 439.
Gould on waters, Secs. 204 to 209.
Cary vs. Daniels, 8 Metc. 466-480.
Merrifield vs. Worcester, 100 Mass. 216-219.
Tourtelott vs. Phelps, 4 Gray 370-376,
Pratt vs. Lampson, 2 Allen 257-284-287.
Angell on Water Courses, Secs. 90-97.

NOTE 7—West vs. Fox River Paper Co., 82 Wis. 647, 650, 655-6.
Wiggenhorn vs. Kounts, 23 Neb. 690, 699.
People vs. Canal Ap. 13 Wend. 355, 370-1-2-3.
Stolp vs. Hoyt, 44 Ills., 219, 223.
Murchie vs. Gates, 78 Me. 300.
Benson vs. Morrow, 61 Me., 345.
Shoemaker vs. Hatch, 13 Nev., 261.
Buse vs Russell, 86 Mo. 209.

public use, and not for private use. (8)

In the Kaukauna Case Justice Brown says: (p 273) "It is probably true that it is beyond the competency of the State to appropriate to itself the property of individuals for the sole purpose of creating a water-power to be leased for manufacturing purposes. This would be a case of taking the property of one man for the benefit of another, which is not a constitutional exercise of the right of eminent domain."

In Water Company vs. Winans, (p. 39.) Judge Cassody said: "It is firmly settled that the legislature has no power to authorize the taking of private property for a public use, without the owner's consent, even upon the making of just compensation therefor."

He further said: (p. 40.) "Of course, the legislature, or its agency, must, in the first instance, determine whether the use for which it is proposed to make the condemnation, is a public use; but such determination is not final as to the character of the use."

Quoting from Lewis on Em. Dom., he further says: "Whether a particular use is public or not ** is a question for the judiciary."

Herein the judiciary is not even handicapped by any legislative assertion as to whether or not the proposed taking is for public use.

Herein the public use, navigation of the public canal, is hindered rather than helped by the proposed taking. The drawing of water for power from canal interferes with navigation. (Pr. R. 282, 343-4-391-2-3.)

It was not competent for the State to take the water power of the riparian owners, except as it necessarily became mingled with the property of the State, at the dams themselves. The power of the State to take the property of the riparian owners in the Kaukauna Case, was not based on the ground

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NOTE 8—Kaukauna Case, 142 U. S,, 254, 273-4.
Water Company vs. Winans, 85 Wis., 26 39 and cases there cited.

that water power could be taken by the State as, and for water power. It was held that such water power as was necessarily created by the building of dams erected for the purposes of navigation, and so became necessarily mingled with the property of the State, expended in the building of the dams creating the power, might be taken, not primarily for the purposes of water power, but, being taken for the purposes of navigation, and being created for that purpose, might be retained by the State, in order that its expenditures in building the dams might not be taken from the public by the riparian owner. The principal asserted in all cases on the subject is this,—When the property of the State, in prosecution of public business, necessarily becomes so intermingled with the property of the individual that the same cannot be separated, the State may take the property of the individual on rendering compensation, rather than that the individual shall take the property of the public, without compensation. (9)

The property of the riparian owners, below the dams of the Canal Company, in the Fox River, has never been improved by the State; and is not in any way mingled with the property of the State. Neither the State or the United States, need to in any way improve it, or in any way mingle its property with it. It stands separate and segregated from, and in no way attached to, the property of the State, or of the United States.

The proposed taking cannot be justified on ground that it is for public use.

NOTE 9—Matter of Albury St. 11 Wend. 156.
Embury vs. Connor, 3 N. Y. 511.
Spaulding vs. Lowell, 23 Pick, 71, 80.
Dingley vs. Boston, 100 Mass. 544, 559.
Fox vs, Cincinnati, 104 U. S. 783.
Hubbard vs. Toledo, 21 O. St., 379.
Att'y Gen. vs. Eau Claire, 37 Wis,, 400.

There are adjudged cases very nearly parallel to the one on trial. (10) Among them is Buckingham vs. Smith. The court there held that the taking more water into the feeder of a public canal than was necessary for navigation, that the surplus might be used for power, was not a taking for public use ; that diversion by such taking, from mills of a lower riparian owner, could not be justified as a legitimate exercise of right of eminent domain. See map accompanying report of this case in original edition of Ohio reports.

Varick vs. Smith is another such case. It determined that water, not necessary to navigation, cannot be carried in the public canal, around a riparian owner, and thus be diverted from his mills below the State dam.

These decisions were under canal acts substantially like our own

In the Barre Water Company case the legislature had granted the company the right to take the water of a stream for fire purposes and other purposes. It appeared that for fire purposes, it was necessary to use at times "all the water that a 16 inch main will supply."

NOTE 10—Buckingham vs. Smith, 10 Ohio, 288-9, 297. Approved by Kaukauna Case; 142 U. S. 254, 274.
Cooper vs. Williams, 4 Ohio, 253.
Same case, 5 Ohio, 391.
Varick vs. Smith, 5 Page Ch. 138, 146, 158.
Same case, 9 Page Ch. 547.
Kane vs' Baltimore, 15 Md. 240.
Kaukauna Case, 142 U. S., 254, 275.
Boom Co. vs. Riley, 49 Wis. 237
Cohn vs. Boom Co., 47 Wis. 314, 325.
Spring V. W. W. vs. San Mateo, W. W. 64 Cal. 123, 131-2.
Fenrick vs. Railway, L. R., 20 Eq. 544.
In Re Barrie Water Company, 62 Vt. 27.
Little Miami Elevator Co. vs. Cin'ti., 30 Oh. St. 629, 643,
Fox vs. Cincinnati, 104 U. S. 785.
Lewis Em. Dom., Sec. 163, 165.
Gould on Waters, Sec. 241. pp 475-6.

It also appeared "that, by reason of the high pressure in the pipes, the water would be worth much more for running motors than for supplying power" to riparian owners.

On this showing, the company claimed the right to take that amount, at any time, and, when not needed for fire purposes, to use it for hydraulic purposes. But the court held that this would be taking private property for private use.

In Kane vs. Baltimore the city had condemned and paid for the bed of the stream where Kane's mill stood. Held, that the city could not destroy the dam, nor prevent Kane's using the power, unless it appeared that the dam or the use of the water, interferred with the furnishing pure and wholesome water to the city.

In this case the diversion of water from plaintiff's mills, to and through the public canal, does not aid, but directly interferes with, navigation.

In Kaukauna case, Justice Brown says: (p. 273.) "Upon the other hand, it is probably true that it is beyond the competency of the State to appropriate to itself the property of individuals for the sole purpose of creating a water power to be leased for manufacturing purposes." Again he says: (p. 275.) "The true distinction seems to be between cases where the dam is erected for the express or apparent purpose of obtaining a water power to lease to private individuals, or where in building a dam for public improvement, a wholly necessary excess of water is created, and cases where the surplus is a mere incident to the public improvement, and a reasonable provision for securing an adequate supply of water at all times for such improvement." Again he says: (p. 279.) "The land was not taken for the purpose of creating water power, but for improving navigation."

In the case at bar it appears that 800 to 1000 cubic feet of water per minute is sufficient for the requirements of navigation. It cannot be pretended that the taking of 150,000 cubic feet of water per minute is not a "wholly unnecessary excess of water." It cannot be said that 150,000 cubic feet of water per minute "is a mere incident to the public" use of 800 to 1000 cubic feet of water per minute.

In Spring V. W. W. vs. San Mateo W. W., Justice McKee said (p. 131):

"Private property contiguously situated to the works of a corporation may be very convenient for its corporate purpose, and the acquisition of the same might add to the wealth of the corporation by enhancing the value of the property which it has in hand, and yet not be reasonably necessary to the corporation in the discharge of its duty to the public. For public uses the government has the right to exercise its power of eminent domain, and take private property, giving just compensation; but for public convenience it has not. A public convenience is not such a necessity as authorizes the exercise of the right of eminent domain."

In Fenrick vs. Railway, in passing upon a question of necessity to public use, Sir George Jessell said (p. 551): "I think the case is concluded by the authorities, (I should have thought it would have been by good sense without authority) that you cannot damage your neighbor's property merely for the purpose of saving yourself a little money where it is unnecessary for the construction of the railway."

In the case at bar, there is no claim that this water-power, by nature appurtenant to land below the dam, is necessary to the public use. The only object in taking it, before the sale of the water way to the United States, would have been the enrichment of the State, the Improvement Company and the Canal Company by the difference, if any, between its value to the State or such company and its value to the riparian owner. Since the sale to the United States, the object in taking would be to enrich the Canal Company by the value of this power, at the expense of the United States, up to the repeal of the Compensation Act, and, at the expense of the riparian owner, since such repeal.

The decisions are uniform that pecuniary advantage to the public, or the corporation representing the public, does not sustain the claim of public necessity.

(b.) Private property cannot be taken for public use without a declaration of the necessity for the taking by the law-making power. (11.)

This legislative declaration or grant must be by express words or necessary implication. (12.)

Is there such declaration or grant by express words?

The only declaration of purpose to take, relied upon herein, is this: Section 16 provides that "whenever a waterpower shall be created by reason of any dam erected or other improvements made on any of said rivers, such waterpower shall belong to the State." It is under this language that the Canal Company claims the water-power in contention.

This power is not created by the State or United States dam. It is created by the Meade and Edward's dam, about two thousand feet below the State dam. There is a fall of about six feet from the foot of the State dam to the level of the pond furnishing this power.

Is it created by "other improvements" connected with this work? No "other improvements" than the Meade and Edward's dam, now exist, which have any relation to this power. The most that can be said in favor of the claim that the water power in contention is created by the "other improvements" of the Improvement is, that it would be physically practicable to divert the water, furnishing this power, from its natural channel, and to use it for power through an enlargement of the State canal, thereby hindering navigation. Is this water-power, "created by reason of any dam erected or other improvements made" within the fair interpretation of this act?

Is there such declaration or grant by necessary implication?

NOTE 11—Water Company vs. Winans, 85 Wis., 26, 39 and cases there cited.

Lewis Em. Dom. Secs. 237. 393.

NOTE 12—Lewis Em. Dom. Sec. 240 and cases cited,

Boom Co. vs. Reilly, 44 Wis. 295.

Penn'a, R. R. Co's appeal 93 Pa. St. 150, 159.

In Penn'a R. R. Co's appeal, Justice Gordon says: (p. 159.)

"This plea of necessity is so frequently used to cover infractions of both public and private rights that, prima facie, it is suspicious, and must be closely scrutinized, especially where it is used to carry corporate privileges beyond charter limits. This plea, in the first place, must be tested by the rule, now of universal acceptation, that all acts of incorporation, and acts extending corporate privileges, are to be construed most strongly against the companies setting them up; and that whatever is not unequivocally granted must be taken to be with held." ***

"In favor of such right there can be no implication unless it arises from a necessity so absolute that, without it, the grant itself will be defeated. It must, also, be a necessity which arises from the very nature of things, over which the corporation has no control; it must not be a necessity created by the company itself for its own convenience or for the sake of economy."

In fact, it is not pretended that the taking of the main body of the water of Fox river is in any way necessary to the navigation of the public canal, or is in any way incident to the taking of enough water through the public canal for the purposes of navigation.

III.

Neither the State, nor the Improvement Company, nor the Canal Company, nor the United States, ever, until filing of cross-bill, **attempted to take** any such property as that in contention.

(a) Section 17 of act of 1848 provides that "when any lands, waters or material, appropriated by the board to the use of the public in the construction of said improvements shall not be freely given or granted to the State, or the said board cannot agree with the owner as to the terms on which the same shall be granted, the superintendent, under the directions of the board, shall select one appraiser, and the owner shall select another appraiser." ***

This section contemplates affirmative action on the part

of the Board in appropriating "lands, waters or materials," and that it shall take the initiative in assessing damages. Justice Lyon said in the Kaukauna case (p. 654.) "But the act of 1848 failed to give the land-owner the right to institute condemnation proceedings."

The water power of the riparian owners below the dams was not, and is not, in any way, necessary to the improvement. It was not actually, physically, appropriated. There is no pretense that the owner ever freely gave or granted it to the State. No act of appropriation is shown. No movement is made on the part of Board to secure assessment of damages. The riparian owner could not move.

Is it not difficult to see how this water power was appropriated by the Board to the use of the State ? No act of appropriation, or proceedings to assess damages, by the Improvement Company or Canal Company, are shown or claimed, other than such as appear from the excerpts which have no relatian to the riparian owner.

(b) **The plan of the Work** as fixed by the Board of Public Works, shows that there was no intention to take any considerable part of the flow of the river through the Improvement canal. The Improvement Company, soon after building of canal, became riparian owner of the north shore from above the dam landing down to the Red mill, about eleven hundred feet below the dam. From this point, down to the first lift lock, it became riparian owner of the undivided half of the north shore, but claiming the whole.

It did not change the plan so as to draw through the canal so much water as it had the right to use as a riparian owner.

(c) It appears plainly from the testimony of expert engineers, that it is not practicable to carry one-half of the water of the river through this canal, while the same is in use for the purposes of navigation, even though the canal has been nearly doubled in size since the work was originally laid out and built, and since the making of the Jenne Maps. The Improvement Company and the Canal Company, its successor, for many years owned about half the flow of the river on the upper level at Kankauna, as riparian owners.

(d) In 1858-9 the Imqrovement Company, having received the title to this line of Improvement from the State, and having no doubt, data since lost, made a series of maps, called the **Jenne Maps.** This series of maps has been since 1859, in both public and private use. It shows the line of improvement from Menasha to Little Kaukauna, inclusive, including the the works at Kaukauna, where the property of the original plaintiff's is situated. These maps, and other maps in evidence, show that the property of the original plaintiffs is a considerable distance, over two thousand feet, below the dam of the Improvement.—That all the water of the river may be used for power between the dam of the Improvement and property of these plaintiffs.—That the Canal Company can use all the rights and priveleges determined by the Kaukauna Case to belong to it, without interference with any of the riparian rights of of these plaintiffs.—That is, that all the water of the river can be used for power, between the Improvement dam and the mouth of the middle channel of the Fox River, at Kaukauna,

The explanatory note reads thus:

"** The full red transverse lines indicate angles, and the blue line, the outer bounds of lands appropriated for the benefit and use of the improvement. * * " This note, together with the **Blue line** as found on the maps, amounts to a declaration that this property of original plaintiffs is not taken, and that its owners cannot claim compensation for taking.

This series of maps is, practically, the only declaration shown in the case, by the State, or the Improvement Company, or the Canal Company, of the "outer bounds of lands appropriated for the benefit and use of the Improvement." It is the most authoritative declaration in the case, on that point.

It also appears in evidence that, wherever the shores are not included within the Blue Line represented on those maps, the riparian owners have used their water power under their title as riparian owners, until the filing of the cross-bill in this case, without interference of, or challenge by, the Improvement Company or the Canal Company.

This appears to be the fact at the north end of the **Grand Chute dam,** and at the **Middle dam** at Appleton, (Map No. 4), and at Kaukauna, the place of the contention,—these being the only places where the point is involved. At the north end of the Grand Chute dam, not within the blue line, investments have been made, on the faith that the riparian owners owned the water power, commencing at a very early date, and continuing, and increasing, down to 1880 when they reached the value of half a million dollars, before challenge by the Canal Company. (Pr. R. 337.)

Similar improvements appear to have been made, on a similar supposition, at the **Middle dam** at Appleton, not within the blue line, running through a course of forty years, continually increasing, and reaching an amount in value of a million of dollars before challenge by the Canal Company. (Pr. R. 337-8.)

Certainly the State and the Improvement Company had a right to declare that this water power was not taken, and thus avoid payment for it. Evidently the water power below the dams was worth just as much to the riparian owner as to the Improvement Company, if not more. There has not been any legislation looking to forcing the State or the Improvement Company or the Canal Company to take it.

The Jenne Maps, sheets 11, 12 and 13 and map No. 1-A, show the premises in contention. We find that the property of the plaintiffs is not included within that Blue Line, but is plainly excluded by it. On the north side of the canal, this Blue Line strikes inland from the north bank of the river, at a point a little above the mouth of the canal, and continues down at varying distances from the canal on the north side to the outlet, or foot, of the same below the Kaukauna rapids. The Blue Line, on the south side of the canal, representing the south boundary of the land or property taken at Kaukauna, for the use of the improvement, leaves the north shore of the north channel of the river, at the foot of the vertical wall, running down from the north end of the dam, and runs along, at varying distances, south of the south bank of the canal, until it strikes the river, just above the outlet of the canal, below the Kaukauna rapids. It thereby ex-

cludes from the land taken for the use of the Improvement, all the north shore of the river, from the foot of the vertical wall, to a point just above the outlet of the canal. The property of the plaintiffs lies outside of this Blue Line, and south of the north bank. This Blue Line leaves the north shore of the river and strikes inland above plaintiffs' land, and above the mouth of the middle channel. The same fact will be noticed on the map of the Improvement at Appleton, where the south shore of the river is excluded by the use of the Blue Line. (See sheets Nos. 4-5.) The proofs show that, on the shores so excluded, the riparian owners have built dams and canals and brought into use water powers, expending upon the same $1,000,000 at the Middle or Grand Chute Island or West dam, and $500,000 at the north end of the Upper or Grand Chute dam at Appleton, as before mentioned.

The proofs also show that at this point the Improvement Company contracted with the riparian owners on the basis that the water power was not taken, and that the Canal Company has purchased water power of the riparian owners and leased the same. (Pr. R. 339-340.)

(e) In fact the Canal Company does not now pretend that it has taken the property in controversy, but only that it has the right to take it when it chooses to do so. On the contrary, it asserts that it has not taken the riparian owners' property, but uniting, as a riparian owner, with the other riparian owners of this particular power, in leases of the same hydraulic power now claimed under the right of eminent domain,

(f) Mr, Stevens read from certain documents to show that in reports of directors to stockholders, and in statements to legislative committees to secure favorable legislation, and in statements to capitalists to secure credit, the Improvement Company has claimed such water powers as those in controversy. Among the excerpts, read for this purpose, is one from a mortgage of the Improvement, made in July 1856, near the time of the surveys for the Jenne Maps of 1859. In this the Company mortgages divers lands "and the hydraulic power owned, or to be owned or acquired."

(Pr. R. 479.) This indicates that there was hydraulic power on the line of the Improvement, not then owned by the Company, but "to be owned or acquired." If there was any such this must have been a part of it. There has been no attempt to show that this hydraulic power has been acquired since 1856. There has been nothing done since 1856 to aid the title of the Improvement Company to this water power except the passing of the compensation act by Congress. This act could not have been in contemplation in 1856.

Much the same as indicated by other manuscripts read by Mr. Stevens. (Pr. R. 476, 484.)

It would, no doubt, have imposed a great hardship to have required the State, in 1856, to take the water power upon the various rapids of the Fox river below the Improvement dams, and to pay the value of these to the riparian owner. Such water powers came into use much later. Many are not even yet in use. Such a burden at that early day would quite likely have crushed out the improvement.

IV.

There was **no notice** of any taking.

The Compensation act was repealed in 1885. After that, the riparian owner had no process, or fund, to secure compensation. The Canal Company cannot claim that his property has been taken unless he had notice of that taking, while there was opportunity to secure compensation.

The Court held, in effect, in the Kaukauna Case, (pp 270, 277, 279, 281,) that the owner could not be deprived of his property unless there was a proper proceeding to take the property, and proper provision for compensation for the taking, and that the owner **had notice** of the taking, before repeal of the compensation act.

If the riparian owner's property had not then been taken it could not be taken thereafter.

In the Kaukauna Case it appeared that written notice of the taking of the water power created by the dam had been given in 1886, five years before the repeal of the Compensation Act.

Respecting this notice, Justice Brown said (page 270) "Until this time there had been no active interference with any claim or riarian rights."

Herein there was no notice. The title of the riparian owners was never challenged until the filing of the cross-bill in 1890, five years after repeal of Compensation Act, except by the vague reports of the officers of the Improvement Company to those with whom it sought credit.

Justice Brown. in discussing when the riparian owners, property was taken, says: (Kaukauna Case, pp 269-70) "It may well be doubted whether the mere construction of the dam and embankment operated of itself to de rive the owner of lot five of any right to the water power, as the water continued to flow past the lot as it had previously done, though at a higher level than before."

The water still runs the mills of the riarian owners below the dam without hindrance by the Canal Company. Its use by them has never been interfered with by the State, the Improvement Company, the Canal Company or the United States.

On the contrary, the **plan of the improvement** adopted by the Board of Public Works, and carried out by the Improvement Company and the Canal Company, declared that it had not been taken. The **Blue Line** declared that it had not been taken. Plaintiffs had been for years in the undisputed, unchallenged, use of their property. The Canal Company bought of riparian owners similarly situated their water power. It contracted with other riparian owners similarly situated on basis of their ownership of water power appurtenant to their riparian lands. In 1881 the Canal Com-Company united with the Patten Paper Company, plaintiff, in a lease of water power held by them as joint riparian owners, to one George F. Kelso. (Pr. R. 29.) Statement admitted. 331, 336.) This was to run fifteen years from August 1st, 1888.

In view of the facts how can the Canal Company claim that the Patten Paper Company's riparian rights in the hydrulic power had been taken by it, under the right of eminent domain, and that the Patten Paper Company had the right

to look to the United States, under the compensation act, for the value of its property so taken ?

Suppose the riparian owners had sought from the United States, under the Compensation Act, the value of their water power between Islands 3 and 4, on the ground that it had been taken for the public use, under section 16. of the act of 1848. What proof could they have made that their property had been taken ?

Suppose they had asked assessment of damages in 1859 or 1860. Could not the Improvement Company have answered—you have not been disturbed in possession or use of your property ; the plan of the works of this company show that there is no intention to take your property ; our public maps show that we do not intend to take it ; we have contracted with the riparian owners, in like situation, on basis that this kind of property was not taken ; and we must not be compelled to take and pay for what we do not want ? Could not the Canal Company have said the same every day of every year up to the time of filing its cross-bill in 1890 ? Could it not have, also, said we have even united with you, as riparian owner, in leasing this water, which you wish us to pay for, as having been taken ? Probably this Canal Company, would, even now, if it were liable for damages for taking, prefer not to take this water power. It would probably not be willing to pay for it. But the United States having assumed the burden of paying, it occurs to the Canal Company to say to the riparian proprietors, after the lapse of over forty years, your water power was taken from you by the Board of Public Works ; you had from 1875, date of Compensation Act, to 1888, date of Repealing act, while we were dealing with you as riparian owners of water powers, in which to ask damages of the United States ; but not having asked it in that time you have no remedy.

V.

By acceptance of the **verdict of Arbitrators** and the **purchasing act**, coupled with the **report of Major Houston,** (part of the Report of Secretary of War, March 8, 1872), the Canal Company practically declared to Congress and the riparian owners that it did not claim to have taken these Kaukauna water powers, created by the fall be-

low the dam. It took from the United States $145,000, which it was not entitled to, if it owned these water powers in contention.

The arbitrators appraised 14,000 horse power, including 2500 only at Kaukauna, to be deducted at valuation of $140,000, being ten dollars per horse power, leaving to be paid to the Canal Company $145,000. The water power at the Kaukauna Government dam was then about 2500 horse power, (Pr. R. 279.) being 300 horse power for each foot fall, (Pr. R. 341,) the fall at the dam being between eight and nine feet. (Pr. R. 242-3, 359-60.) That is the amount reported by Col. Houston to belong to the Canal Company at Kaukauna, (G. B. & M. Doc. 69-70,) and the value of which was charged by the Arbitrators and Congress to that Company in fixing the amount to be paid for the Improvement. (G. B. & M. Doc. 67-8-6, 73,75.) The whole fall at this point being 50 feet, (Pr. R. 334, 471, 480) there was left a fall, below the dam, of over 40 feet. (Pr. R. 205) furnishing over 1200 horse power at same rate per foot. If the Canal Company had represented to the arbitrators that it owned the 1200 horse power, at Kaukauna below the dam and appurtenant to the land of the other riparian owners, they evidently would have valued that alone at $120,000 and the United States would have paid the Canal Company $25,000 instead of $145,000.

The water power in same situation, at Appleton, was more than enough to cover the remaining $25,000 on the same basis. (Pr. R. 477-8-9, and Houston's Report, 484, 339.)

This water powar furnished by the rapids below the dam, has not been charged by the United States to the Canal Company; and therefore the United States should not be required to pay for it, and turn it over to the Canal Company. And if the United States should not pay for it, as between it and the Canal Company, then the riparian owners should not be deprived of it. If they have lost it there must have been provision for compensation.

VI.

The Kaukauna Case proceeded in the Supreme Court of Wisconsin, and in this Court upon the basis that the act of

Wisconsin of 1848, was not, in itself, sufficient to enable the State, or its grantees, to assert the right of eminent domain, on the ground that no adequate provision was made, in it, for the condemnation of lands, or for compensation. (13.)

Both courts asserted, however, that the Compensation act of Congress furnished proper process for the ascertainment of damages, and an adequate fund for the payment thereof.

It necessarily follows that **there cannot have been any taking of property under act of 1848,** unless damages for the taking can be assessed under the Compensation act. Both acts must apply to any parcel of property, or it cannot have been taken. Section 1. of the **Compensation act** provides that "in case any lands or other property is now, or shall be , flowed or injured by means of any part of the works of said Improvement heretofore or hereafter constructed, for which compensation is now, or shall become, lawfully owing, * * * * * * the amount of such compensation may be ascertained in like manner." Evidently Congress did not intend to make compensation, except for such lands, or other property as "is now or shall be, **flowed** or **injured**" by means of the Improvement.

NOTE 13—Kaukauna Case, 70 Wis. 635, 623-4-5.

Same case, (42 U. S. 254, 277.)

(a) The most casual glance at the situation will show plainly that **no part of the property** of the riparian owners, **below the dams** of the Improvement, **has been flowed** or **injured** by means of the works. Hence, no such property was in contemplation of Congress when it passed the compensation act.

These remarks have special force and significance in this case when we consider the legislation and arbitration leading up to the purchase of this Improvement by the United States.

If the riparian owners have lost this property it is only because the United States became, by purchase of the Improvement, and its subsequent legislation, bound to pay for it. The repeal of the Compensation act does not change

the construction of the act. We must look at it as now in force, and we must not say that it provided for compensation for this property unless we would so say if we were considering an application of riparian owners against the U. S. for compensation for the taking of hydranlic power.

The **opinion of Attorney General Pierrepont** treats this Compensation act as relating only to flowage. (Canal Co. Doc. p. 84 to 91.)

In **construing the compensation act** we must take into consideration the Arbitration act, the report of Secretary of War to Congress with the accompanying reports of the Arbitrators and of Major Houston, and the purchasing act. The purchasing act was the outgrowth of the report of the Secretary of War and the accompanying reports. These reports show plainly that Congress was informed, and induced to believe, that the Canal Company did not claim the water-power at Kaukauna below the dam. The Canal Company accepted the provisions of the Purchasing act, passed on this information, and in this belief. Congress passed the Compensation act on the same information, and in the same belief.

Suppose the Canal Company should now, to assure its title to the water-power, make compensation to the owner as for a taking, and so become subrogated to the rights of the riparian owner to compensation, could it justly claim to be reimbursed by the United States? Can the United States be made to pay, under condemnation proceedings, under this Compensation act, for this water-power, whose value was not deducted by the arbitrators from the gross value, and which the Canal Company, by adoption of the arbitrators' verdict, amd the Purchasing act, has disclaimed? Such a rule would, before repeal of Compensation act, have compelled the United States to condemn and pay for a vast amount of water-power, which would have cost the United States millions, and to turn it over to the Canal Company. Since the repeal, such a rule would take from such riparian owners water-powers worth millions, now, and for many years, used to run mills, builts without challenge from, and under the actual encouragement of, the Canal Company, and leave such owners without remedy.

VII.

But it is claimed that **the dam** reaches across the river, to which extent it is a **Cross dam**, and then extends down on the north side of the river, over two thousand feet. It is further claimed that the decision in the Kaukauna Case gives the Canal Company the right under eminent domain, to all the water power furnished by the use of all the water of the river when carried down river about two thousand feet below the north landing of the cross dam; that is, down to the upper lift-fock. Such claim was urged, herein, in the State Court. This claim rests on the supposition, that the the water being held in the canal, above the upper lift-lock, at the level of the mill-pond, the canal bank for over two thousand feet is part of the dam, within the meaning of that decision. If sustained, this claim takes their water power from the riparian owners on over two thousand feet of the rapids next below the dam. The fall through such two thousand feet, is over eleven feet, (Pr. R. 360,) furnishing over 3300 horse power. The diversion of all the water of the river into the canal, and the carrying of the same in it, to the first lift-lock would divert it entirely from the mills of original plaintiffs, which are on the north channel and which now enjoy a head of about sixteen feet. (Pr. R. 360-1.) On the same reason, if all the locks had been bunched at the foot of the canal, the dam would be over a mile in length; and all the water of the river might be diverted from the entire rapids below the Government dam.

Does the decision of this Court holding that the Canal Company is entitled to the hydraulic power maintained by the dam mean the hydraulic power maintained by the cross-dam and the embankment of the canal to the first lift-lock?

If so, that decision brings great disaster.

The decision was an affirmance of the decision of State Court. In that case Supreme Court of Wisconsin, speaking by Justice Lyon, said (70 Wis. 635, 657) "We do not here determine the relative rights of the plaintiff" (the Canal Company) "and other riparian owners below the dam in respect to the use of the water which would run over the dam

if not taken from the pond into the canal ; nor do we consider whether there is any restriction upon the manner or place in which the water shall be returned to the river below the dam. We only hold that the plaintiff owns the surplus water power created by the dam."

That the wood "dam" as used in the Kaukauna Case both by this Court and the State Court included the cross-dam only and not the canal embankment, is quite plain. See thelanguage used by the State Court in 70 Wis.

"Surplus water power created by such dam. The water is drawn by the plaintiff from the pond above the dam, into a canal on the north side of the river." pp 636-7. "At the north end the dam abutted upon land of the Improvement Company, and at its south end on a lot designated as lot 5," * * "A canal on the north side of the river is supplied with water from the pond." p 640. See picture of plat of old dam, new dam, canal of plaintiff and canal of defendant. p 641. "In 1876 the United States erected a new dam at Kaukauna, across the Fox River, forty feet east of and below the old dam at its south end and 110 feet at its north end. The old dam still remains, but is flooded and rendered useless by the new structure." p 645. "Located on its canal below the dam," p 649. "Should have the entire and absolute control of the dam, embankments, canal and all appliances necessary for the purpose of navigation as well as of the waters in the pond created by the dam." 651. "It probably is not well founded as to the additional embankment constructed from the old to the new dam." 655. "The dam and embankment belong to the United States." 657.

See the language used by this Court in 142 U. S. "The Improvement Company * * built a dam at the head of the rapids, so as to raise the water about eight feet above the natural level, reaching from lot 5, section 22, south of the river to section 24, north of the river, and also built a canal and locks on the north side of the river reaching from the pond created by the dam to the slack waters of the river below the rapids and below the dam. * * * * The dam so constructed was maintained by the * * Canal Company until 1876, when the United States * * built the new dams

now in question, forty feet below the old one, p 258. Map or plat on p 261. See also references to "old dam" and "new dam" on pp 270-1.

See the language used by the Supreme Court of Wisconsin in this case, 90 Wis. 370. "Between the years 1851 and 1856 a public dam was built * * at the head of the rapids, for the purpose of creating slack water above, and feeding a canal around the rapids." p 372. "This dam created about a nine foot head, equal to about 2700 horse power of water. A navigable canal was constructed from the pond made by this dam to slack water below the rapids." p 372.

"The crest of the Government dam is lower than the walls of the canal." p 373. "The canal takes its water from the pond immediately above the dam." p 373. "But it is not the dam itself of which complaint is made. It is claimed that the dam is unlawfully used as a colorable device for the purpose of creating a water power at a point at some distance removed from the dam." p 401.

"It is evident that the water-power which was created incidentally by the erection of the dam is due to the gravity of the water as it flows from the crest to the foot of the dam." p. 401.

"What further power it may have in its present distribution is not incidental to the erection of the dam." p. 401.

"The power created by the cutting of the Canal was not incidental to the erection of the dam or to the construction and use of the Canal for navigation." p. 401.

"In some sense it may be said that the first reach of the Canal down to the first lock is a part of the dam * * * * * but as bearing upon the question as to what rights are incidental to the building of the dam proper, it is a perversion of terms and ideas." p. 401.

The use of the word "dam" in the testimony and maps (see Jenne maps No. 11 in particular) shows that the same was not intended to include canal embankment or land between canal and river. So with such use in all the pleadings except perhaps the cross-bill. Col. Houston speaks of "the water power created by the dams" and calls that at Kaukauna 2500 horse power. (G. B. & M. Doc. pp. 69, 70.)

VIII.

But it is said that if this Court did not, in the Kaukauna Case, hold the dam to extend down on the north side of the river to the first lift-lock, it ought so to hold now. The Canal Company, insists that it should, at least, be permitted to carry the whole flow down its canal to the first lift-lock.

* * **What would be so taken?**

The whole flow of south channel from the foot of the dam to the foot of the lower Island, and the whole flow of the middle channel from the head to foot of Island No. three, would be taken. (The ordinary low water flow of whole river is 150,000 cubic feet per minute.) (Pr. R. 341, 447, 461.) The flow of south channel is fixed at forty-three two hundredths of the river, (Pr. R. 520,) or thirty-two thousand two hundred and fifty cubic feet per minute. The fall of this water from the foot of the dam to the foot of the Island is about forty feet. This gives over twenty-four hundred horse power. The flow of the middle channel is fixed at sixty-two two hundredths of the whole, (Pr. R. 520,) or forty-six thousand five hundred cubic feet per minute. Fall of middle channel is over sixteen feet. (Pr. R. 520.) This gives over fourteen hundred horse power. We then have by this rule thirty-eight hundred horse power taken from riparian owners between the dam and the foot of the Islands. But the water so diverted would be used by the Canal Company or its lessees on an increased head of eleven feet if used on the lower lot. (Pr. R. 360.) This seventy-eight thousand seven hundred and fifty cubic feet of water per minute, on an eleven foot fall gives sixteen hundred and forty horse power.

Presumably the water power taken was to be paid for. Hence, on this basis of taking, the State took from riparian owners, and rendered itself liable to pay for, thirty-eight hundred horse power of water in order to get to itself less than half that amount. The difference between the power taken and the power gained by the State would be taken from the true owners, (if not paid for) or from the State, (if paid for) and given to the riparian owners on the north channel below the upper lift-lock. They would then have the use of

the whole flow of the river, instead of ninety-five two hundredths, their proper share, on the fall of twenty-three feet.

The United States granted lands "for the purpose of improving the navigation of the Fox and Wisconsin rivers * * and of constructing a canal to unite the said rivers." (14)

The State delegated the power of eminent domain to a Board of Public Works in these words. "In the construction of such improvements the said board shall have power to enter on, to take possession of, and use all lands, waters, and materials, the appropriation of which, for the use of such works of improvement shall in their judgment be necessary."

Evidently nothing could be taken under this power unless the taking thereof was, in the judgment of this Board, necessary "for the use of such works of improvement"—that is necessary "for the purpose of improving the navigation of the Fox and Wisconsin rivers."

We have **no declaration** of this Board **that the taking** of this water power **was** in "their judgment" **necessary** for this purpose. If there was such declaration, we should know it to be a false and fraudulent one, unless we say that the raising of funds for the prosecution of the work was necessary within the meaning of the act of 1848. But the necessity of mere economy does not justify the taking.

We are asked to **infer that the Board determined that** in "their judgment" **this taking was necessary** "for the purpose of improving the navigation of the Fox and Wisconsin rivers." from the fact that having the power, the Board of Public Works began, and the Improvement Company, as its successor, under the act of 1853, completed, this work of improvement in the manner above stated.

In order to divest the title of the riparian owner, without compensation, by inference, it would seem that the inference should be an absolutely necessary one. Every doubt ought to be resolved in favor of the riparian owner, that his property may not be taken without compensation.

NOTE 14—Sec. 1, ch. 171, Act Cong., 1846.

Is it not a very extravagant inference, that the Board intended to take from the riparian owners thirty-eight hundred horse power, to give to the State less than one-half that amount, leaving the balance to be transferred from one riparian owner to another? Can it be supposed that the Board determined to take, and burden the trust fund with liability to pay for, water power of which the State could not avail itself of the half?

The description of the works of the Improvement, (Pr. R. 334-5,) shows that the Board adopted the plan which seemed most economical without reference to water power. If not, why did they not run the first level down to the foot of the rapids and take the whole power? In order to do that, it was only necessary to lay the canal a little fufther inland so as to keep on ground about the height of the upper level, until a point was reached over against the foot of the rapids. The enlargement of the canal so that it would carry all the water of the river would have increased its cost only ten to fifteen per cent in upper part and thirty per cent in lower part. (Pr. R. 436-7.)

In considering this question we must not, on account of apparent present conditions, overlook the then conditions. Neither the State nor the Improvement Company had title to any land on which the water power could be used on either side of the river until August, 1855. (Pr. R. 382-3-4-5.) The work was then substantially completed. Up to this time it was as convenient and advantageous to the State or the Improvement Company to lease the power furnished by the dam for use on the south side as on the north side. (Pr. R. 434.) There was no more trouble in carrying the surplus water around the south end of the dam than in carrying it from the canal to the river on the north side. In one case a larger head race was required and in the other a larger tail race.

Canal Company claims that the use of water from the canal indicates the intention to take, by eminent domain, down to first lift-lock.

At commencement of this action, and at trial, there were leases of water by Canal Company and its grantors, at Kau-

kauna, to be drawn from the canal on the north side of the river, to amount of 680 horse power, (Pr. R. 365) requiring for fullfillment a flow of about 20,000 cubic feet of water per minute, or one-seventh of the flow. (Pr. R. 361.) But the parties holding the leases were accustomed to use more water than their leases provided for, by consent of the Canal Company. (Pr. R. 341.)

The Canal Company then claimed, and still claim, the right to carry much more water than this through the Government canal, for hydraulic power, on account of its riparian ownership of the north bank of the river from above the dam to the first lift-lock. No water power has been actually taken or used by Canal Company, the use of which is not properly referable to its riparian ownership.

Doubtless this water power in contention is parcel of what Col. Houston in his report to the Secretary of War speaks of as "An immense water power in the Lower Fox, entirely independent of the works of improvement, part of which has been made available by works of private parties." (G. B. & M. Doc. 70.)

It was necessary for purposes of navigation to raise all the power of the river by the dam, Hence, the water power so created was incident to the public service. The water being raised to the proper level, it was not necessary for such purpose, to take the one hundredth part of it in tothe canal. (Pr. R. 341.) Hence, the taking of more was not incident to the public service. If navigation hereafter requires more there is no hindrance. The necessity of the use is the measure of the right. To that extent the water is public, not private, property.

MOSES HOOPER.

For Original Plaintiffs,

Defendants in Error.

No. 190. 14.

Brief of Ordway for D. C.

Filed Jan. 6, 1898.

JAN 6 1898
JAMES H. McKENNEY,
CLERK

IN SUPREME COURT OF THE UNITED STATES.

October Term, 1897.

No. 190.

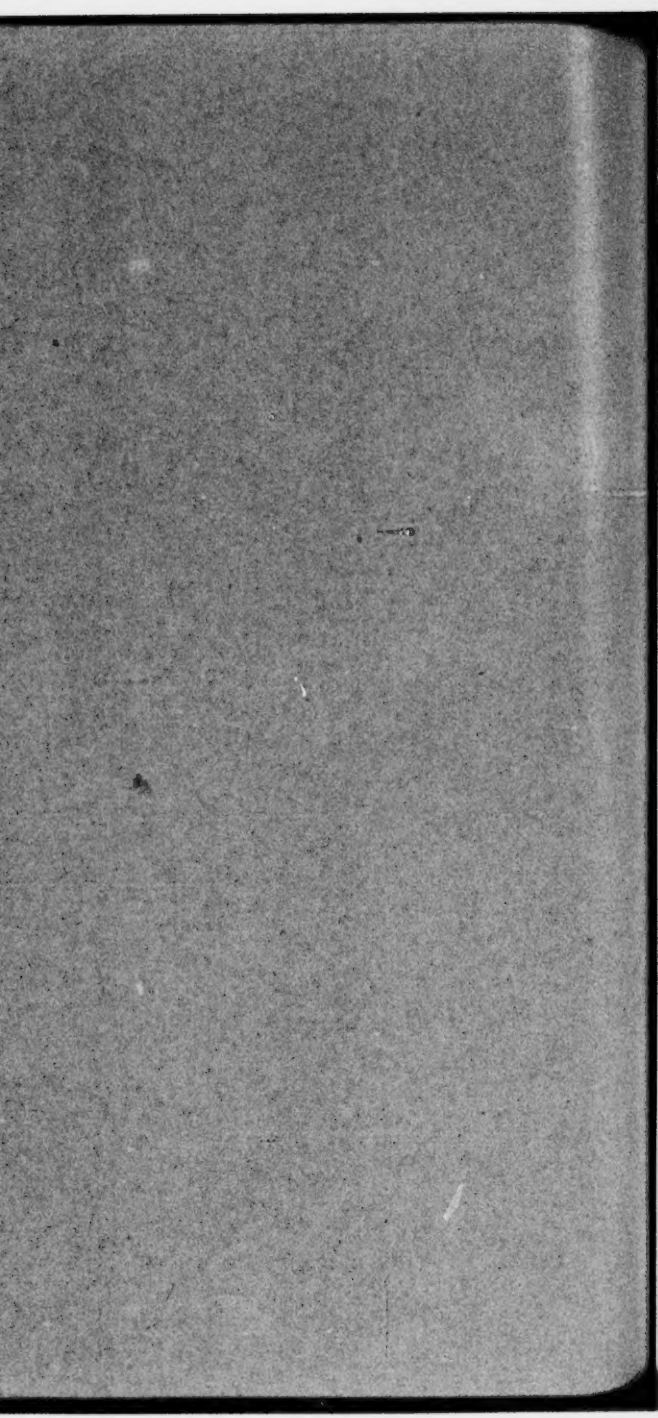
THE GREEN BAY AND MISSISSIPPI CANAL COMPANY, PLAINTIFF IN ERROR,

vs.

THE PATTEN PAPER COMPANY (Limited), THE UNION PULP COMPANY AND THE FOX RIVER PULP AND PAPER COMPANY, KAUKAUNA WATER POWER COMPANY, HENRY HEWITT, Jr., W. P. HEWITT, ET AL., DEFENDANTS IN ERROR.

BRIEF OF DAVID S. ORDWAY, ATTORNEY FOR DEFENDANTS IN ERROR HENRY HEWITT, JR., AND WILLIAM P. HEWITT, AND OF COUNSEL FOR KAUKAUNA WATER POWER COMPANY—ON THE MERITS.

SWIGGER, ARNDT & ALLEN, PRINTERS, MILWAUKEE.



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Brief on behalf of defendants in error, Henry Hewitt, Jr., William P. Hewitt and Kaukauna Water Power Company, in answer to the brief of the plaintiff in error, on the merits:

I.

When, if ever, a federal question is found in this record, and it is also found to have been *rightfully* decided, the judgment will be affirmed. The whole case is not here for review. The jurisdiction "*is limited to the decision of the questions mentioned in the statute.*" *Murdock vs. City of Memphis*, 20 Wall. 627-628-636; *Bank of Commerce vs. Tennessee*, 163 U. S., 416.

II.

What federal question may be found by this court, I am frank to say I cannot now conceive of. Counsel for plaintiff in error, as it seems to me, expend the most labor upon two propositions, in both of which, they aver, is a federal question.

First, that the State Court failed to give due force and effect to the former judgment of the same court in the case of the Canal Company vs. the Water Power Company and its lessees and affirmed in this court, 142 U. S., 254, and

Second, that the claimed riparian rights of the plaintiff in error were not involved in this action and that therefore the State Court judgment was and is void, mere waste paper and not due process of law.

The ***first*** proposition *i. e.*, that the former judgment is conclusive here, adjudging that the plaintiff in error owns the right to use and appropriate the whole fall in the river from the foot of the Government dam down to slack water, fails ***for at least two reasons,*** so far as defendants in error, Hewitts, Patten Paper Co. limited, Union Pulp Company and Fox River Pulp & Paper Company, are concerned. They were neither ***parties*** or ***privies*** to that litigation, and because the action was not brought for any such purpose.

That action was by Canal Company for an injunction against the Water Power Company to restrain it from drawing water for hydraulic purposes from the pond created by the Government dam. The prayer for judgment was in these words, "wherefore this plaintiff prays judgment of this Court for costs against the K. W. P. Co. and perpetually enjoining and restraining the defendants and all and singular their agents, servants and employees from interfering by force with this plaintiff and its servants, agents and employees while engaged in maintaining, repairing or rebuilding said embankment and drain over, on and upon lot six, and from in any way hindering or preventing this plaintiff, its servants, agents or employees in the repairing, rebuilding and maintaining said embankment and drain, and enjoining and restraining said defendants, their agents, servants and employees from in any way interfering with, or cutting, breaking, tearing away or removing said embankment or drain on lot six.

And commanding the defendant, the Kaukauna Water Power Company, to rebuild and restore to its former state and condition the embankment and drain on said south bank of said river upon and across said lot six.

And also perpetually enjoining and restraining the defendants and all and singular, their agents, servants and employees from drawing any water from said mill pond for hydraulic purposes, or any other purpose than the ordinary use for agriculture."

While the judgment ***might have been variant from the prayer, if within the case made by complaint and answer, it was not,*** but followed the prayer.

No question, either in the pleadings or proofs in that case

was raised except as bearing on the right of the Water Power Company to take water from the Government pond. The principal reason given by the court for that judgment was, that it would be impracticable and dangerous to the rights and inconsistent with the exercise of the duties of the owners of the improvement to allow of a divided ownership of the use of the water of the pond created by the Government dam. No such reason existed as to the ownership of the use of the water down stream from the foot of the dam, so that, even so far as the Water Power Company (which was a party to that action) is concerned, that judgment in no way operated upon or affected the matters at issue under the cross bill herein. If this is a correct answer to that claim, on behalf of the Water Power Company, it is certainly as effectual on behalf of the defendants in error, who were plaintiffs in the original action and of the Hewitts.

But what shall be said as to that contention, after reading the opinion of the State Supreme Court upon the subject in connection with the judgment and prayer for it? Certainly no federal question is to be found in this record so far as the effect of that judgment is concerned.

As to the second proposition of plaintiff in error, above mentioned, to wit: that *its claimed riparian* right to divert the water of the north channel for hydraulic purposes down through the canal and discharge the same down stream from or below the lands of the Water Power Company and of the Hewitts, was not in issue under the cross bill *and answers thereto* and that the State Court judgment *was void* and that therefore it, plaintiff in error, had been deprived of its property without due process of law; I answer *first* that the State Supreme Court decided that such *claimed right was in issue;* this was so decided upon a construction of the pleadings, and I suppose that such decision, merely as to the construction of State Court pleadings, is not subject to review upon this Writ of Error. But if your Honors will pardon me, I print here a part of the argument submitted to the State Supreme Court, on that subject.

Plaintiff in error, in argument, for rehearing in State Supreme Court, (*page 31*) *inter alia*, says:

Claim No. 1.

This is the claim of a riparian owner. It is in proof that the canal company is the owner of the north bank of the river from the foot of the cross-dam down to the seven-acre tract, and is the owner of the undivided half of the seven-acre tract, which extends to a point quite a distance below the first lock. It is also the owner of undivided interests in the shores of islands Nos. 4 and 3, on the south side of the north channel; thus giving to the company as riparian owner the whole power of the north half of the river above island No. 4, and the greater part, but not the whole, of the power appurtenant to the north channel below the heads of islands Nos. 4 and 3. This claim of ownership, therefore, is restricted to something less than the flow of the north channel, and hence less than the half flow of the river appurtenant to the north bank.

The canal company's rights as riparian owner are as sacred and as much entitled to protection from the court as the rights of any other riparian owner. Superior to any other owner the canal company has the exclusive right, as between it and the United States, of cutting through the embankment of the canal improvement and of diverting the water from the pond above the dam. There is not in the complaint in this action a prayer of any kind against the canal company, and the judgment of the court is that it would not be competent to grant relief against the company were all the allegations of the complaint true. The cross-bill of the canal company does not extend the issues in any respect so far as affects the half flow of the river appurtenant to the north bank, nor in any respect so far as affects the north channel, and only extends the issues with reference to the half flow appurtenant to the south bank.

And yet the opinion finds that "all the parties to the action, except the Green Bay & Mississippi Canal Company, are riparian proprietors or lessees of water-powers upon the rapids below the dam who are damaged by the diversion of the water from its accustomed channels." This is a clear misapprehension of the proofs. Not only is the canal company interested as riparian owner in the north channel, but so also is it interested as such owner in the middle channel. The opinion appears to have been written in some respects under a misapprehension of the testimony. It purports to define the company's rights in the flow of water, without, at the same time, defining the rights of the other riparian owners, parties to the litigation, and this on pleadings in which there is no prayer therefor. The riparian rights of the canal company should appeal to the court for protection quite as

strongly as those of other owners. Clearly the court has misconceived the situation, and rehearing is respectfully prayed.

B. J. STEVENS (Madison, Wis.), and
E. MARINER (Milwaukee, Wis.),
Attorneys for Respondent Green Bay & Miss. Canal Co."

Mr. Mariner (in a separate brief), for respondent, Canal Company, upon the appeal of the Water Power Company, Hewitts and others, from first judgment, submitted certain propositions as to where the water should be returned to the river after its use by plaintiff in error, and commencing at page 18 of that argument combatted the theory of the present defendants in error in pretty bold and vigorous language. I replied to such parts of that argument as I deemed not well grounded in law, in a printed brief, which I partially, but fairly, I think, reproduce here, for the purpose of showing fairly what was tried before and submitted to the court below, commencing my quotations on page two (2) of that argument, viz: (These quotations are all in different type from the body of this brief.)

At the foot of page 20 of the brief of Mr. Mariner will be found the following sentence: **"It is essential to the determination of the disputes between the parties in this case that the question as to whether the whole flow of the river must come to the land of the Kaukauna Company at the foot of the dam determined."**

He then proceeds, throughout pages 21, 22, 23, 24, and a part of 25, to combat what he admits to be the doctrine contended for in my brief upon that question, as established by all the authorities, English and American, and reiterated by the late Chief Justice Story, and near the foot of page 21 uses this language:

"The law does not sanction any such monstrosity, no matter what names are behind it. All these cases go upon the mistaken idea that if a part of the water is withdrawn by one of two opposite proprietors, less than his share, the other proprietor does not get the full dynamic effect of his share of the water on his side. Now it is a fact in physics, that all the water of a stream cannot run to the mill owner on one side, and all of it run to the mill owner on the other side; that if the water is to be used by the mill owners on opposite sides, there must somewhere be a division of its flow, half of it, if the

parties are equal owners, coming to the mill on one side and half of it to the mill on the other, and as a fact in physics it does not matter, in material results, whether the current is separated one mile, or a hundred miles, or ten feet, above the mill wheel, if one-half of the water comes to the mill on one side and the other half of it comes to the mill on the other side, the dynamic effect is the same in each case.

Each riparian proprietor has the right to draw one-half of the river through his wheels, although not more than one-fourth of the current flows on his side, and he has a right to so arrange the flow of the river as to get his half, but he has no right to interfere with the flow of the water in the stream so as to prevent the full one-half of the flow of the river going to the other side."

This general statement of counsel is, to a very slight extent, correct, and the part of it which is correct lies in the very last sentence of the quotation, but is entirely irrelevant to the question under discussion.

In order to a correct understanding of the question and an intelligent reply to the sentences above quoted, it is proper to state a few facts, and general rules of law applicable to the situation and rights of parties here, which are so well established as not to require argument, and as to which I suppose there now is no contention.

1. The ownership of the largest part, undivided, of the southerly half of the bed of the river, from the up stream end of island No. 4 down to the mouth of the middle channel on the northerly side of island No. 4 is in the Water Power Company; upon the opposite side, in the Canal Company. Within this distance is a fall of several feet, and all of the flow of the river due to that channel, except such as is necessary for navigation, should pass over the bed, the same as it did in a state of nature.

The Water Power Company has the absolute right to extend a dam, from the northerly bank of island No. 4, (commencing at the mouth of the middle channel, or at any point up stream from that) northerly to the thread of the river, and it has no right to extend either a dam or any other work of improvement beyond or north of the thread of the stream. *Richardson vs. Emerson*, 3 Wis., 319. (Dixon's Ed. 288.) Any erection extending beyond or north of the thread of the stream could lawfully be removed by the Canal Company as a private nuisance, or any proper action for damages on account thereof, or to restrain or abate the same, could be maintained in the courts.

Suppose the water passing down the north channel as in a state of nature to be three feet in depth, and suppose this wing dam to be five or any other proper number of feet high,

the right of the Water Power Company would be to take out of the river, upon the upper side of such dam, all the water that it could thus obtain, and as it might see fit to appropriate for manufacturing purposes, even if in so doing it should use all the water running in the natural channel at that point, the canal company not using or desiring to use its half, and no ouster being perpetrated. It is a tenant in common of the right to use all the water of the river under such circumstances, and would not be liable to its co-tenant for any such use of the same, unless it excluded its co-tenant (the canal company) from a similar use. That is a right, in addition to the right to use half the water of the stream, (*Freeman on Co-tenancy*, Sect. 258; *Pratt vs. Lamson*, 2 Allen, 288) and the Water Power Company could not be interfered with, (except on the part of the public for the purposes of navigation) either by the Canal Company or any other party, in such use of the whole water of the north channel at that point, unless the Canal Company sought and was excluded from a similar use of its half upon its side of the river.

This being so, it requires no argument to show that if the half of the water of the river, which it is claimed belongs to the owners of the north bank, is diverted from the north channel down the Government Canal, only one-half of the flow due to the north channel being left to pass down the same, even if the bottom of the river should be level from bank to bank at the point of location of the supposed dam, there would flow down the stream, water *to only one-half the depth* which would there flow if no such diversion at the point above took place; as a matter of course, one-half of that remaining half, to-wit, only one-fourth of the natural flow, could be obstructed by the wing dam of the Water Power Company, and caused to pass into and through the wheels of its manufacturing establishments there located, while the other half would pass on down stream, north of the end of the wing dam, over that part of the bed of the river belonging to the Canal Company, with no power in the Water Power Company to go upon the land of the Canal Company lying north of the thread of the stream for the purpose of erecting or constructing appliances for possessing itself of the one-fourth of the stream thus running to waste. *It is true that if the Canal Company, in mercy or by grace, saw fit to extend a wing dam from its bank of the river opposite to the northerly end of the Water Power Company's Wing dam, it might possibly thus force the whole half of the water of the bed of the river into or upon the works of the Water Power Company, but so long as it refrained from so doing, the Water Power Company would be entirely powerless.*

The absolute property rights of individuals in this country have never as yet been thus placed under the arbitrary control or caprice of other competing and contentious parties. Counsel seems to ask this question as if the whole doctrine, as established in this country and in England, with reference to water rights and rights in water courses, was entirely different from other property rights.

2. The right to the flow of the water in a natural state over the bed of the stream is as much individual property "as the stones scattered over the soil." You have no greater right to divert the water than you have to remove the stones, or a portion of the soil under the water, or the grass and the trees growing upon the banks of the stream. *Case vs. Hoffman*, 84 Wis., 451. It is not a question of expediency, or of hardship, or of what may be beneficial to the public, or of what may be beneficial to individual owners—it is a simple question of personal right. You might as well argue upon the propriety of depriving one of part of his supply of wheat, or lumber, or other article, or of requiring him, whether he will or no, to divide with his more needy or covetous neighbor. We have not, as yet, arrived at that point of time when such agrarian ideas prevail.

Among and west of the Rocky Mountains, where physical conditions are entirely different, and demand a different rule as to individual rights, because of the necessities of the many, constitutional provisions have been changed, and the statutes of states and of the United States have been altered so as to fit those different conditions; but not elsewhere, so far as I have been able to ascertain, has the doctrine, announced and expounded by Mr. Justice Story with so much clearness and perspicuity, been denied. That doctrine, instead of being doubted, or in any way detracted from, has been quoted with approval and re-affirmed by English as well as American courts, and particularly in the case of *Wood vs. Waud*, 3 Exch. (Wellsby, Hurlstone and Gordon) 773, 774, upon which pages the language of Chancellor Kent upon the same subject is also quoted with approval.

3. While it is true that in a case where the owners of opposite banks of a stream have united in the construction, or are the owners of a dam which crosses the entire stream, landing upon the banks of either and both, that each is entitled to the use of half of the flow of the stream, regardless of the formation of the bottom or the bed, or upon which side of the stream the most water passes, yet that rule cannot probably be made to hold good in a case where the water runs deeper upon one side of the stream than upon the other, where no such dam has been erected across the entire stream and where

only one bank owner has erected his dam to the thread, because no one has any legal right to extend his dam beyond the thread onto the land of the opposite owner, nor has he any legal right to construct in the bed of the stream any wall or other contrivance or obstruction for the purpose of changing the course of the flow of the water, even upon his own land. If it is said that this gives an opportunity for the owner of one side of the river to place himself in the position of the "*dog in the manger,*" the answer is, that it is the natural right of a man to take that position with reference to his own, if he chooses to do so; except where a statute prevents. (*Head vs. Amoskeag Co.*, 113 U. S., 23.) And second, that the fault or misfortune, if it be one, lies in the fact that the would-be owner of a water power either had not sufficient knowledge or ability to purchase one, or the necessary inclination to do so, and in the case at bar it looks very much as if such want of knowledge or inclination was also supplemented by a very strong desire, amounting very nearly to covetousness, to obtain that species of property without paying for it.

Counsel, upon page 23, makes three short quotations from the opinion of Justice Story, and then adds:

"These three paragraphs show that Judge Story considers the determination of the question to depend upon the physical effect." Continuing, he says: **"Certainly they are, but where are they so entitled to take and use it?** (Referring to the point of use of the water.) **At the lower dam, for there is the place where their right attaches, and not at any place higher up the stream."**

Of course that language referred to physical condition of things at that particular dam; but if the question is asked with reference to the water in the north channel at Kaukauna, of which we are now considering, my answer to the question, "*where are they entitled to take and use it?*" is, at any and every point or place along the north bank of Island No. 4, between the mouths of the south and the middle channel, wherever the Water Power Company sees fit to use it. They have as much right to use it at each such point as they have to place a dam thereat, and they may use it at a half dozen places or more, if they see fit so to do, between the points mentioned; and the Canal Company, under all authorities, has no right to take out of the stream and use elsewhere its claimed half, or any other part of the flowing water of the river. *I am not obliged to show a water power—only do so by way of illustration, and as ground for an injunction.* There is no question in this case of simple abstraction of water for private or domestic purposes, but the single question is as to the right of *diversion, and the only wrong complained of is diversion—*

not of an imperceptible, insignificant portion of the flow, but of a large and important part thereof. * * * * * * * *

"5. **There is another right** which would belong to the Water Power Company had there been a dam constructed by the owners of both banks extending entirely across the stream at any point between the middle and south channels of the river, ***which is also directly invaded*** by diversion of the water from its natural flow down the stream. It is agreed by all parties that at, and upon the raising of water upon such a dam the owner of each side of the stream has the right to the use of half of the water flowing therein, to be taken and used at their respective ends thereof, and upon their respective sides of the stream; ***this additional*** right is to have the whole flow and force of the water at the point of use—in other words, upon and at such dam—and whenever the owner of either side fails to use his half, the owner of the opposite side may use the whole. Therefore if, when both are drawing water to the full extent of their rights, each half and half, the water stands exactly even with the surface of the dam, but without overflowing—if one at the noon hour, or at any other time within the twenty-four hours of the day, ceases to draw water through his wheels, the result must be a rise of head upon the dam and in the pond, because the opposite owner who has not ceased to draw, is using water to his full capacity and can use no more upon the cessation of draft upon the opposite side, the result of which is, and must be, to create a ***greater head*** and much greater power upon the wheels of the owner so continuing operation. This is a reciprocal right, common to both proprietors, and an additional head so occasioned, of a foot or two, more or less, upon either side, would add just so many horse power to the capacity of the mills or manufacturing establishments of the respective owners, while the other might be using less than his share. Neither has the right to draw more than half when the other is using his half—such is the limit—but, in the nature of things, either may benefit by the cessation of operations of the other. This right and benefit would be totally destroyed and taken away if either were permitted to withdraw his half from the stream at any point above the point of location of such dam. * * * * * * * * * * * * *

Upon page 37 Mr. Mariner commences a separate proposition with these words: **"It is said by the Patten Company that no attempt was ever made to take the water power on the islands."**

With reference to that I will add, that in my opinion such proposition is absolutely correct, and not only that no such attempt was ever made, but that it was not the intention of the

State or the Board of Public Works to take either the water power on the islands or on the south channel, because, *under the legislation and condition of things which existed* at the time of the excavation of the canal and the erection of the dam, and up to August, 1855, the canal was obviously intended to be of so small proportions as not to furnish water power anywhere upon it for successful manufacturing operations.

Clearly, there were two opinions entertained at that time, as stated by Mr. Martin in his testimony, (page 348 of Record) and the contract between Mr. Martin and Mr. Lawe, (pages 379-380-381 of Record) calling for a canal of greater dimensions than that required under his contract with the state, (**i e, 5 foot dam, 40 and 60 foot canal, and 4 feet depth of water**) shows that *he supposed* when making that contract with Mr. Lawe, that the enlarged canal which he thus agreed to construct, and in which he agreed to place bulkheads on Mr. Lawe's land, all sufficient for carrying the whole flow of the river, was a matter of private contract, and that the water power thus abstracted from the canal would belong to the *riparian owners*. The fact that Mr. Lawe entered into that agreement and took that bond from Mr. Martin, shows that he (Martin) actually supposed that the creation of water power at the point in question was for the benefit of private owners, to-wit, himself and Mr. Lawe, and not in any sense an undertaking by or on the part of the Board of Public Works. It matters not how great was the mistake of Mr. Martin upon the question of ownership, the inquiry being confined now to what the state actually condemned—had a right to condemn, without making of compensation, and what the state then actually intended to condemn or thus appropriate, and I submit that it is clear upon this record that *it was not the intention of the state, or the Board of Public Works*, to appropriate any of the water flowing below the Government Dam, (using the word dam in the sense which we have upon our side all the way through this case) and that if such is a fair deduction from the testimony, then that the language of the Act of 1848 should not be construed in its broad sense, so as to deprive private owners of water not necessary for navigation, but should be given the strict interpretation, which all the authorities agree in, where the rights of private individuals are sought to be invaded by the public under acts of legislation the language of which are general, as in this case, and especially where the power to take *is limited by the very wording of the act to such as may be necessary for the public purpose contemplated.*

It is not denied that the capacity of the canal might have

been increased, or may be increased, whenever necessary for the purpose of navigation, and more water thus taken from the upper level may be so appropriated by the Government, if found necessary, without compensation, but that can only be upon purchase or condemnation of more of the land of private owners for the purposes of such enlargement.

Counsel further, near the foot of page 45, puts his contention in this way: **"It must be found from the testimony that it was the intention of Martin in the beginning, which he subsequently induced the Board of Works to adopt, then carried out as contractor and as Vice-President of the Improvement Company, to have constructed this canal down to the first lock at least of a capacity to carry the full flow of the river at an ordinary stage. There is no escape from it. It was Martin's contract with Lawe to do this. Lawe was on the ground to see to it that it was done. The work was begun by Martin and was adapted to do it. The wall was laid in the North embankment where it is to-day.**

"It must also be found from the testimony that the primary object of the Board of Works and the Improvement Company, in erecting this work of improvement from the upper end of the Hunt land, the whole of it, clear down to the slack water at the foot of the rapid, was to build a work for navigation; that the water power developed was but an incident. That whatever water power was created by such work was water power which should belong to the State by the Act of 1848."

Part of this quotation I assent to, and part of it I dissent from. All the first part is but a repetition of what I have before herein referred to as the private enterprise of Mr. Martin and Mr. Lawe, from which it plainly appears that whatever water power was created by or along such canal on Mr. Lawe's land was not intended or expected to belong to the State, either under the act of 1848 or in any other way, and that this was so I think is proved to an absolute demonstration by the fact that the Improvement Company, in 1855, purchased of Mr. Lawe his undivided half of the north bank of the river from above the dam to a point below the first lift-lock in question, (see deeds, pages 383-384-385 of Record) and thus became the owner of such water power as was then supposed to belong to Mr. Lawe, and his entire interest in the water-power question then ceased. In 1861 the Improvement Company and Martin joined in the first lease for hydraulic purposes, a small matter of 100 horse-power; (see pages 370-374 of Record) and the subsequent history of the contest over claimed water rights under this act of 1848 is written in detail in the reports of this court from that time to this.

AS TO ARGUMENT OF MR. STEVENS. (I said)

1. I shall refrain (unless the court requests it) from attempting to follow the attorney for Canal Company through his labored effort to demonstrate, contrary to all the allegations of his cross-bill, that this whole undertaking from start to finish has been carried on by the State of Wisconsin and its creations, i e., the successive corporations through whose possession the improvement has passed, merely as agents of the United States, and that finally the principal, simply conveyed and transferred to the last agent, *inter alia*, the right to use all of the water of the Fox, not necessary for navigation. * * * * * * * * * * * * *

Appellants put it in this way:

The respondent, after vainly striving to make money out of the improvement and its land grant, finding itself without profits or dividends, with (I may be pardoned for using the expression) an elephant of large proportions upon its hands, with land damage claims to untold amounts staring it in the face; the improvement itself, in view of later railroad building and competition, of questionable utility, undertook to unload onto the general government; procured the passage of the act of 1870 by congress, and went before the arbitrators with their own witnesses. Mr. Stevens, being the attorney for the G. B. & M. C. Co., made proof of what ***they claimed was the value of their property***, and it was found to be $1,048,070, that is, the value of the property they inventoried as theirs, without any question being raised as to whether it was theirs or not. Deducting sales of granted lands, $723,070, there remained $325,000 to represent the found value of what respondent ***claimed to own and be able to deliver***.

The commissioners then said, ***You have proved your claimed water powers*** to be the value of $140,000. We do not care whether you own them or not; we think the United States has no use for them. We will recommend that the government take the water way, dams, canals, locks, etc., at your figures, and relieve you of it and of liability for its future maintenance, but as to the remainder of the property, we shall recommend that it be left upon your hands; we do not think that the United States needs it. You have submitted considerable testimony to prove that you own the water powers already developed by dams built, and you have claimed more, where dams are not yet built, but we will take no account of all that. Your canal, as you have valued it, we will recommend the taking of; if you wish to sell, say so. Attorney for the Canal Co. says that, "***while protesting they yet con-***

sented," and if your Honors please, we think not very reluctantly, and that they closed the greatest bargain of their lives; got out whole, while the United States then commenced to, and are now industriously defending against such an avalanche of flowage claims as would have bankrupted a half dozen companies with larger means than this respondent ever had. * * * * * * * * * * * * *

2. The case of *Scranton vs. Wheeler*, 57 Fed. Rep., 803 (Cir. Ct. of Appeals, 6 Circuit), so largely quoted from by Mr. Stevens, arose in the State of Michigan, where the law upon the subject of ownership of the bed and banks of navigable streams is the same as in our own state, is fully in accord with the decisions of this court, and fully establishes the doctrine in that jurisdiction so decisively and clearly laid down for Wisconsin in 1882 by the late Mr. Justice Taylor in the case of *Black River Improvement Co. vs. LaCrosse B. & T. Co. et al.*, 54 Wis., 681, from which opinion I have freely quoted at pages 82 and 83 of my opening argument. I also here call the attention of the court to other parts of the opinion of Mr. Justice Taylor, upon pages 684 and 685 of the same volume:

"It will be seen, from a consideration of all the facts in that case, that this court also held, that under authority from the state for the purpose of aiding navigation, the corporation had the right to keep and maintain in the river opposite to the riparian owner's land, and between the thread of the stream and the land of such owner, permanent fixtures driven into or resting upon the soil under the navigable waters of the river, without making any compensation therefor. These opinions of this court seem to have adopted the doctrine of the cases above cited from the courts of other states and of the United States as to the power of the State to control the waters of all navigable rivers or other waters of the state whenever such control is exercised in the interest of navigation."

The U. S. Government could undoubtedly, if necessary for the purposes of navigation, close the canal and excavate, out of solid rock, another, down through or along the bed of the south channel, and, if necessary, in the opinion of Congress, for purposes of navigation, turn all the water of the river down the south channel, thus rendering valueless all the improvements upon the north side, and without payment of any compensation therefor. Such are the risks and possibilities which one incurs in putting valuable improvements upon a navigable stream like the Fox, which is part of and used in connection with an *interstate* line of commercial communication. If the river was all within this state, and no part of an *interstate* line, although navigable, the rule might be different, possibly, as to compensation.

3. The attorney for the Canal Company has thought it proper, without the request of this court, to *re-argue* the original question *as to where* title to the bed of navigable streams in this state should rest—whether in riparian owners or the state. This subject is introduced into subdivision 1 of the first point in his argument, commencing on page 23 and extending on somewhat indefinitely, more or less, throughout his entire brief, and upon pages 25 and 26 are quotations and citations from decisions of the Supreme Court of the United States, doubtless intended to have weight with this court upon this argument upon this original question. With reference to all that part of counsel's argument, I will simply say that, as an original question, *in my opinion*, the decisions of Wisconsin, Michigan, Illinois, Ohio and Mississippi are based upon the sounder grounds and better reasons. Apply the doctrine *now attempted to be again contended for* by the attorney for the respondent, and you will have strips of land *innumerable* extending and scattered all over and through the northern part of our state, beds of navigable streams (with the difficulty of determining where navigability ends or ceases), to which the doctrine would apply—substantially "No Man's Land"—of no conceivable use or benefit to any one except riparian owners, of not importance enough to the state to pay the expense of surveying or caring for them, and a source of endless litigation because of the difficulty in determining in each particular case, whether the steam was in fact navigable or not; little strips of land under water bordering upon navigable streams bounding and dividing the possessions of riparian owners, of no use to the state except for the purposes or protection of navigation—not liable to assessment or taxation, in many instances, perhaps, of considerable extent, as, to illustrate, at Kaukauna, where the stream at the foot of the rapids widens out and is of very slight depth over a considerable extent of country, of no value to the state, *and the absolute control of which, for the purposes of navigation, under the doctrine established by this court, secures to the public all*, and the only rights which it, by possibility could have therein. *This new doctrine established here would, in verity, be the sowing of seed for a terrible crop of litigation.*

The doctrine contended for, and perhaps as clearly supported by all the arguments which can be brought in behalf of it, is found in *Barney vs. Keokuk*, (an Iowa case), in which state the evils and embarrassments to which I have above, now called the attention of the court, probably cannot to any considerable extent arise, because of the topography of the country and its remoteness from the sources of small navigable waters, with which the northern portions of Wisconsin

and Michigan are literally filled. That case, however, firmly and effectually settles the doctrine that *the title* to the bed of all such streams *is where it is placed by the decisions of the courts of last resort of the state in which the question arises*.

The doctrine now sought to be introduced into this state by counsel, if adopted by this court, would unsettle all the titles to land under water of the Milwaukee River at Milwaukee, of the Rock, of the Fox, of the Wisconsin, of the Oconto, as to all which adjudications have been had, and of every other navigable stream in the state, because, within the contention of Mr. Stevens, based upon the case of *Shively vs. Bowlby*, 152 U. S., 1 to 58, inclusive, patents were issued *by the government while yet Wisconsin was a territory*, and therefore it is argued that no title passed by such patents, but that all lands under water navigable, in fact, passed from the general government to the State of Wisconsin upon its admission into the Union as a state.

As to the case referred to, *Shively vs. Bowlby*, it is enough to be said here, that the only point for decision therein, or decided in fact thereby, was whether the title to land *under tide water* upon the Columbia River, near to the Ocean, passed by an ordinary patent of the government, issued while Oregon was yet a territory. Of course, that decision has no application to the case at bar. The opinion contains one of the most exhaustive and instructive reviews and examinations of the law, and the decisions upon the subject embraced therein, to be found anywhere in the reports; but all that part of it which has reference to the ownership of the bed of streams lying *above tide water* is, of course, only by way of illustration, information and instruction. Upon my first obtaining that opinion some months since, I read and studied it with care with reference to this particular argument, and then noted, what I now state to the court, that it had no application whatever to this case.

On page 43 of *Shively vs. Bowlby* under point 8 of the opinion, it is plainly shown *that it is within the power* of Congress to grant land below high water mark under navigable waters in a territory of the United States; but the term, "navigable waters," I think it fair to state, is there used with reference to the navigable waters being considered of in that case, to-wit: tide waters, although the reference to the case of *R. R. Co. vs. Schurmeir* would seem to indicate that possibly the same doctrine might be applied to land under the water of the Mississippi River. But, be all that as it may, I am able to find no decision of the Supreme Court of the United States which either literally or inferentially interferes with the doc-

trine so long and so firmly established as to such cases by this court.

4. **Mr. Stevens, in his so-called statement of facts,** page 16 of his brief, *reiterates* as a matter of history, that which in this particular case, is entirely incorrect, and of which there is not the slightest evidence in the record, and whatever evidence there is upon that subject is directly contrary to the alleged fact.

He says: **"On the south shore, opposite the Kaukauna Rapids, French claims, so-called, were run out."** The record shows nothing of this, and, in fact, it was not so. These lands were surveyed by the United States, platted, sold and patented, after the extinguishment of the Indian title thereto shortly after 1820, in the form in which they are shown upon the map embraced in my brief. To go outside the record—there never was but one private land claim made at Kaukauna *upon the south side of the river*, that was made by Paul Ducharme in 1820, and was in 1823 rejected by Congress for the reason that the Indian title had not then been extinguished. The record shows (*upon special request of Mr. Stevens*), folios 891-902, that these lands upon the south side were entered in 1835, and patented in 1837, in the form in which they are shown upon the map; and it further shows, contrary to the oft-repeated statements of the attorney for the Canal Company, that lots 5, 6, 7 and 8, in section 21, and lot 1, in section 22, were all *entered together*, in one body, in 1835, and patented to Daniel Whitney in 1837, passing from Whitney to Boyd and Beaulieu September 10th, 1835, making a river front on the south side, *of 125 rods up and down the stream*, which before then had been improved *for the Indians*, which improvement, enlarged by Boyd and Bulieu, remained in their possession and ownership down to September 23d, 1871; so that the point made by counsel, *if of any significance in the case whatever*, to-wit: that no one on the south side was possessed of any land upon which water power could be utilized, fails, and the contrary is affirmatively shown by the record. I think it remarkable, to say the least, after the insertion into the record of the detail and history of this title, that counsel should again, at this late day, insert those statements in his brief. *I, of course, seize upon those facts as showing that, by the diversion of the water by the Canal Company,* valuable water powers belonging to the Water Power Company were destroyed; down and along those 125 rods of river front were the heaviest rapids, [as is also shown by this record], existing upon the south side. I only make prominent that fact as one upon which to ground our request

for an injunction, and to ask this court not to leave us to our simple common law right of action for damages.

5. As to whether the canal which carries, and its banks sustain the water at the height of the upper level as far down as the first lift lock *is to be construed* as all "dam" I have already in my opening argument submitted my views sufficiently at length.

6. As to the *supposed third* ground of action, set forth in the Canal Company's cross-bill (**P. 46 and 47, Case,**), to-wit: *res judicata*—our understanding is that this court expressly reserved its decision upon the question of *diversion* below the dam. See the wording of the judgment at folio 240 of Case.

7. As to the *claim* under the statute of limitations, *i. e.*, the *fourth* ground of action, found at page 49 of the printed case, and continued in brief of Mr. Stevens under and by *points* 5 and 6, it is sufficient in my opinion to say that *there are no facts pleaded*, which show, and no evidence of any *adverse entry under claim of title* exclusive of any other right, founded upon conveyance or judgment with continued occupation and possession under Sec. 4211 of our statute (the 10 year provision), or of any **"actual continued occupation of any premises under a claim of title, exclusive of any other right,** * * * under the twenty-year section, *i. e.*, Sec. 4213. See also *Jessup vs. Loucks*, 55 Penn. St., 350-361.

The cause of action of the Water Power Company is for a *nuisance* the continuation of which constitutes a *continuous* injury, and, therefore, the Statute of Limitations does not bar the Water Power Company rights until twenty years have run upon the *last* act of trespass, (*Colrick vs. Swinburne*, 105 N. Y., 503), *and as the cause of action* both at law for damages and in equity for an injunction arises out of the perpetration of the nuisance, and is based upon the ownership of the property upon which the injury is inflicted, no cause of action can be barred while the legal cause of action remains.

It is, as understand it, settled law that successive causes of action accrue to the owner, Water Power Co., for each day's maintenance of the nuisance, and that it is entitled to recover some damages for each trespass, even though it be only nominal (*Colrick vs. Swinburne, supra,*) and that the Water Power Co. may delay and join together such causes of action as have not then outlawed, or it may bring an action daily and recover such damages as it can establish (*Baldwin vs. Calkins*, 10 Wend., 170), and as the jurisdiction in equity arises by reason of the necessity of repeated actions at law to redress the wrong, it would seem from the very nature of the case, to continue as long as that necessity exists. *Galway vs. M. E. R. Co.* et al., 128 N. Y., 147.

8. In reply to the ninth point made by Mr. Stevens, pp. 19 and 45 of his brief, to-wit: "*The appellant's claims are without equity.*" I think the best argument which I can present is to be found in the opinion of Mr. Justice Pinney in this court, in *Rogers vs. Van Nortwick*, 58 N. W. R., 762-763, and in the decision of the case of *Galway vs. Metropolitan E. R. Co.* 128 N. Y., 132 (and cases to which reference is made in C. J. Ruger's opinion, pp. 141 to 157, inter alia, *Rubber Co. vs. Rothrey*, 107 N. Y., 310-316, Law; *Ramsden vs. Dyson*, 1 H. L., Cases, pp. 129 and 168; *Plimmer vs. The Mayor*, &c., 9 L. R., Appeal Cases 712, A. D. 1884), where the right to an injunction was maintained in an action commenced *eleven* years after the railroad was completed, and principally upon the ground that the railroad company had, from the beginning, claimed the legal right to construct its elevated road without payment of compensation to lot owners, and that its expenditures had not been made by reason of any silence or want of action on the part of lot owners, even as it is alleged in the cross-bill here that the Canal Company *always claimed* the right to divert the whole water of the Fox without purchase or condemnation.

We think that the case of the appellants is both legal and equitable.

DAVID S. ORDWAY,
Of Counsel.

After the appeal of the Canal Company from the last judgment of the trial court had been dismissed by the Supreme Court, by its order of March 10, 1896, the Canal Company made a strong appeal to the Supreme Court, substantially to be allowed to reopen the whole case. This appeal was made by a singular application, in form; the motion containing the argument. See pages 581 to 591, inclusive, of the printed record. In opposition to that application I prepared and submitted to the State Supreme Court an argument, portions of which here follow, viz:

I.

"The burden of the complaint of counsel is, that the Canal Company is, by the judgment, refused the right to divert the water of he Fox River out of its natural channel and away from the lands of the Kaukauna Water Power Company, while it had neither purchased such right or taken it under proceedings for condemnation. Its position is this, to-wit: That

it is the owner of the north bank of the Fox River from the government dam down to about the mouth of the middle channel (which claim we do not admit, because we think the government is the owner), a distance, in round numbers, of perhaps a thousand feet, within which distance there is a fall in the river of somewhere from five to seven feet; that, being such owner of the north bank and of the bed of the stream to the center thereof, it has the legal right to divert from the bed of the steam *what it is pleased to call its* one-half of the water appurtenant to the north channel and to leave flowing therein only the remaining one-half of the water of the river.

To illustrate the absurdity of this claim it is only necessary to suppose the Canal Company to be owner of the north bank of the river, and the bed thereof to the thread of the stream, from the government dam at Kaukauna all the way to Green Bay, within which distance, as shown by this record, there is at least 75 feet fall, and that Canal Company claimed the right to take from the natural bed of the river *its claimed one-half* thereof down its canal, for hydraulic purposes, and return it again into Green Bay, thus leaving Fox River proper only one-half its natural size. After the adjudications which have been made by this court in this and other cases, I do not propose to attempt a re-argument of that question until called upon by this court so to do; but because two members of the court have become such since argument of this question in the former cases will simply call attention to two, and perhaps *the two leading cases*, showing the groundlessness of the contention of the Canal Company.

1st. *Webb vs. Portland Manufacturing Company*, 3 Sumner, 189.

2nd. *Parker vs. Griswold*, 17 Conn., 288, in which last cited case the plaintiff claimed that one-third or one-fourth of the stream was diverted from his land, and that the defendant claimed a right thus to divert the water for his purposes in opposition to the rights of the plaintiff. The defendant claimed that the plaintiff had no such right, as he owned the land only on one side of the stream, and that very little water was thus diverted, so that the surface of the stream was not lowered more than over one-third to one-half an inch. The defendant also claimed that, as riparian proprietor, he had a right to the reasonable use of this stream of water for his manufactory, and that he had only so used it; and if thereby no perceptible or substantial damage was done to the plaintiff, he could not recover.

The court said, at page 301: "The next question is whether the plaintiff is precluded from an action for a diversion of the water from his land, because he owns the land only

on one side of the stream and to its center. A right to the use of a stream being inseparably annexed and incident to the land over which it flows, it follows that it is illegal to divert it from that land. This principle applies whether the proprietor owns the whole or a part only of the bed of the stream. Hence it is laid down, that where a stream of water is the boundary line between the land of two persons, neither can divert any part of the water without a license from the other." This decision was in a case like the one at bar, where the plaintiff, owner, had no improvements for the use of the water power upon his land from which defendant was so diverting.

This court has declared the above, as laid down in the Connecticut case, *to be elementary law*, and with so long a line of decisions in its favor, I think I am justified in suggesting that this motion for rehearing is really for the purpose of scolding the court.

II.

When we, on behalf of the Kaukauna Water Power Company, entered upon resistance of this claim of the Canal Company of the right to so divert the water of the stream, *Varick vs. Smith*, 5 Paige, 137; and 9 Paige, 548, was our leading authority; upon it and numerous other similar cases in New York, Ohio, and elsewhere we planted ourselves, and this court has thus far sustained us in our position.

Counsel, upon page 10 of their argument for re-hearing herein, as they have often heretofore done, ask the court to disregard these decisions and reiterate their former complaints, averring that if adhered to by this court the right of the Canal Company to use the water power created *at the dam* "is but a barren right." If this is a fact, it is no fault of ours; it simply results from want of foresight on the part of those who planned and originated their supposed water power. *But it is not a fact.* The Canal Company has all the rights which the state had, and can lease to the Kaukauna Water Power Company, or others, *which is all the state could have done.*

By way of illustration, counsel (page 10), inserts this supposition: "Had the United States * * * * * * * builded the dam lower down on the stream and across the point of Island No. 4, would the United States be required to turn the spill of the dam into the several channels of the river in the exact proportions the water were wont to run, and if so, how would this be accomplished, and what consequences would result to the United States if not accomplished?"

There are several sufficient and proper answers to be made to this question.

1. The dam was not built across the point of Island No. 4, and it is not a supposable case, or apt to be put by way of illustration.

2. It could not have been built by the United States, the State of Wisconsin, or any other instrumentality of the public across the point of Island No. 4, without either purchasing such point or condemning it. If such purchase was made or condemnation had, the compensation due to the owner would have been provided for, and that would have answered or settled the question propounded by counsel. The public has a right to place dams in navigable streams for the purpose of navigation, and to raise such dams to the top of the banks, or high water mark, for the same purpose, but has no right to appropriate private property, even for public purposes without just compensation.

This proposition the leading counsel for this motion ascertained (at the cost of the Canal Company), to be the law of the land, notwithstanding his stout and persistent contention to the contrary, in the case of *Pumpelly vs. The Canal Company*, 13 Wallace, 166, where the Supreme Court of the United States ends its opinion, written by the late Mr. Justice Miller, in these words: "*We do not think it necessary to consume time in proving that when the United States sells land by treaty or otherwise, and parts with the fee by patent without reservations, it retains no right to take that land for public use without just compensation, nor does it confer such a right on the state within which it lies; and that the absolute ownership and right of private property in such land is not varied by the fact that it borders on a navigable stream.*" [Italics mine.]

Counsel asks (near the foot of page 10), "If the shore line must be washed by the waters wont to pass it, why not the first foot close under the dam, as well as any foot further down the stream?"

It will be time enough to answer that question when some defendant has constructed his dam within one foot of the down stream line of his ownership or possession of a stream, and a question is thus raised, as to whether by so doing he is returning the water to the bed of the stream *upon his own land* so that it may reach the land of his neighbor in the condition in which it was wont to run.

The courts doubtless would apply the maxim, "*de minimis non curat lex*," to such a condition of things unless it was obvious that the owner would be deprived of some essential right thereby.

III.

Counsel for the Canal Company (in his proposition "b," page 12, in its present motion papers), uses this language,

"while this court holds that the place where the appellant may use the water of the pond, is restricted only by its duty to refrain from injuring others, nevertheless, *in disregard thereof*, the judgment requires the whole water of the river to go to the head of Island No. 4, and one hundred and fifty-seven two-hundredths of it to pass through the channel on the north side of Island No. 4, although the fact was and is that the appellant was able to draw that portion of the water appurtenant to the north bank of the river from the pond through the canal, and there use it without injury to the respondents; and by reason whereof the appellant is excluded from its accustomed use of water power appurtenant to the north half of the river, a use in the pleadings conceded by the Patten Paper Company and alleged as a fact by the Kaukauna Paper Company."

With reference thereto, I have this to say, to-wit:

1. That neither the Kaukauna Water Power Company or the Hewitts are bound by the admission of the Patten Paper Company, whose attorney in this main suit is the long-time leading attorney for the Canal Company.

2. That the Kaukauna Water Power Company never alleged in its answer, or elsewhere, that the Canal Company was able to draw water, in any quantity, for hydraulic purposes through the canal, *except by wrong and in utter disregard* of the legal rights of other riparian owners upon the opposite bank of the river.

IV.

The original action of the Patten Paper Company, *et al.*, (into which this cross-complaint was interjected), was commenced for two purposes only, one to apportion the water between the three several channels thereof at Kaukauna (there are two other channels below Island No. 4, one on each side of Island No. 2, as to which the record is silent, and no adjudication has been attempted); the other for an injunction and for damages against the Kaukauna Water Power Company for diversion down the *south channel* of more water than was owned by that Company, to the injury and damage of the plaintiffs, Patten Paper Company, limited, *et al.*

The prayer of that complaint is: 1. "Determining and adjudicating what share or proportion *of the entire natural flow of said Fox River is appurtenant to and of right should be permitted to flow in the south, middle and north channels of said river respectively.*" 2. Restraining the defendant, Kaukauna Water Power Company, and all persons and corporations claiming under it * * * from drawing and

passing around and below the head of Island No. 4, more water flow of said river, than one-sixth part thereof, or more than the amount which by nature was appurtenant to and flowed in said south channel of said river, and 3, That the Kaukauna Water Power Company pay to the plaintiffs the cost of the action.

Your Honors can see that this action for apportionment of water in the various channels named is of no importance whatever, so far as the ownership of the river below the Government dam is concerned, until those channels are improved for hydraulic or water power purposes.

If the water flows free over the dam, and the channel below the same is as it was in a state of nature, the water will discharge itself over the bed and pass down these channels without interference on the part of any one. If the question shall be as to how much water may be taken from the upper level created by the government dam down the respective canals, by the Kaukauna Water Power Company on the south side, and the Canal Company on the north side, then the division of water secured by the judgment in the main suit would be of great importance—supposing the last named parties had between themselves the right to draw all the water of the stream down those two canals in some proportions, not ascertained before the entry of that judgment.

Again, if a dam should be continued across all the channels at about the level created by the Meade & Edwards dam on the middle channel, striking the north bank at about the location of the red flouring mill, designated in this record as the mill of A. L. Smith, and striking the south bank of the river at about the location of the Badger Paper Company mill, and thereby the entire water of the river raised and set back to the foot of the Government dam, *which is entirely practicable*, then the question of how much water each proprietor upon each channel should be permitted to draw at that *second level*, would be determined by the judgment in this original action, and the drawing would be regulated by properly constructed head-gates, or by the amount of issue ascured at the point of discharge.

The broad claim of the Canal Company interjected by its cross-complaint had nothing to do with the questions involved in the main suit, except to assert that all this labor of apportionment of water between the channels was idle and useless, so far as the Canal Company was concerned, because it was owner of all of the water power upon the rapids. In asserting that claim, it sets out in its cross-complaint not only its claimed right under the Canal Law of 1848, but sets out its purchase of the land bordering the north bank of the

river from above the Government dam down to the red mill of A. L. Smith, above mentioned, and it bases its claim to divert upon all its rights, both of grant from the state, under the Canal Law, and purchase from George W. Lawe. This right to divert water, as stated in the opinions of this court, was really the only question for litigation or litigated.

Counsel for this motion for a re-hearing upon page 3, takes the liberty of making this assertion: "The water appurtenant to the north bank was not in controversy." I submit that if that question was not in controversy, then that there was really nothing in controversy, or submitted to the court for determination by their cross-complaint. The bill of exceptions contains full proof of the ownership by the Fox & Wisconsin Improvement Company of the north bank of the river from above the Government dam down to the red mill, under purchase in 1855 from Lawe & Meade, George W. Lawe being the patentee thereof from the Government, full proof of which purchase from the Government is also contained in the same bill of exceptions; why, therefore, counsel has so far forgotten the record as to make the assertion last above quoted is more than I can understand.

V.

Counsel upon page 4 of their motion papers starts another proposition in this language: "And the record does not support the statement that this judgment had been entered by agreement and stipulation between such riparian owners, there being no such stipulation in the record." This is stated with reference to a quotation from the opinion of the Chief Justice, filed on the 10th of March last (1896), stating that the judgment for division of water was entered by agreement and stipulation between the riparian owners, including the Canal Company, and comes very strangely from counsel for the Canal Company. The facts were these: Testimony was taken at great length, all of which appears in the bill of exceptions, tending to establish the various claims of the owners upon the respective channels, north, south and middle; Kaukauna Water Power Company attempting to show that about one-fourth of the water of the river was due to the south channel—plaintiffs, by Messrs. Hooper & Hooper, their attorneys, attempting to show that a much larger amount of water was due to the middle channel than to the south channel, the Canal Company standing very nearly indifferent, and as to that question, represented also by Messrs. Hooper & Hooper, while the Hewitts were interested to show as large

an amount of water due to the north channel as the proofs would possibly support.

The testimony of Capt. N. M. Edwards, Civil Engineer, was largely relied upon by all parties, and after the hearing had progressed before the trial court for a half day, or such a matter, and all parties present, it was suggested on behalf of the Water Power Co. that the proofs might be held fairly to show that a fourth of the water of the river was due to the south channel, also on the part of the Patten Paper Company and the Canal Company, that not more than one-fifth or sixth of the water of the stream was due to the south channel, whereupon, pending an adjournment, all parties consulted together and consented that the trial court might properly find and determine the water due to the three respective channels in proportions stated in the findings and judgment. In one sense it may be said, and in a very proper sense, that such finding was by stipulation and agreement, but as a matter of fact, *it was made upon full proofs*, which are embraced in the bill of exceptions, and of which I have no hesitation in saying amply sustain the judgment for division of water, and I think the same proofs would have sustained a finding that one-fourth of the water, or perhaps one-fifth of the water, was due to the south channel; there was testimony both ways, and the finding of the court would not, in my opinion, have been disturbed if anywhere within the bounds above stated, and thus under the prayer of the original complaint the decision was simply as to how the water divided itself down those respective channels in a state of nature, and no one, so far as I know, has ever excepted to or disagreed with that decision.

VI.

I think that counsel may well be apprehensive, under the decisions already made in this case, as to the success of their extraordinary contention. And I further think the decisions already entered establish, almost to a demonstration, that the water of the river must be returned to the bed of the stream at the foot of the Government dam. The maps and measurements contained in the bill of exceptions, in connection with the explanatory testimony thereof, show that the south end of the Government dam strikes the south bank of the river just at the up-stream point of the mouth of the south channel, and only about three hundred feet up stream from high water mark of Island No. 4. The formation of the bed of the stream between the dam and the point last mentioned is such, that as a matter of fact, the water can not be discharged out of the Government canal, after being used for

hydraulic purposes, at a point further down stream at the north end of such dam, than the foot thereof, and come to its natural condition before entering the south channel. *If this is true*, and any one familiar with the location, the record, the maps and photographs, which have been in use by and before the court upon the various arguments hereof, can readily see that it is, it is the duty of the Canal Company to desist from its further, I was about to say, contumacious contention and recognize its obligation to comply with the judgment of this court.

DAVID S. ORDWAY,
Attorney for Henry Hewitt, Jr., and William P. Hewitt and of Counsel for the Kaukauna Water Power Company."

Mr. Moses Hooper, attorney for the *plaintiffs* in the original action, defendants in error here, in his brief opposing the last above mentioned motion, *inter alia*, used the following language, viz:

* * * * * * * * * * * * * * *

"Point is made by appellant that the rights of riparian owners below the dam ***were not put in issue*** by the pleadings or prayer for judgment. (Brief, pp. 4, 5, 6, 7, 8.) Herein the attack is not upon the order dismissing the last appeal, but upon the former opinion, the mandate to the Superior Court, on which the judgment appealed from was entered.

But the pleadings did put in issue the rights of riparian owners on the respective channels. The object of action, as shown by the complaint, was to restrain the diversion of the water so that same might flow in the respective channels in the natural and rightful proportions. The cross-bill is directed to that question and no other. It sets up the right of the Canal Company to divert the water from all the channels as its convenience may require. The plaintiff and other defendants challenged this claim, by reply and answer.

This state of the pleadings raised two questions: 1st. What proportion of the volume of the river passed through each channel by nature? 2nd. What right, if any, had any party to the suit to divert any part of the stream so that it could not pass to the use of the riparian owners on the respective channels?

The issue being fairly presented by complaint, cross-bill,

answer and reply, the prayer for judgment became immaterial.(1)

Note 1.—R. S. Sec. 2886.
Edleman vs. Kidd, 65 Wis., 18, 25.
Brooks vs. Chappell, 34 Wis., 405, 419, 20.
Sage vs. M. Laughlin, 34 Wis., 550, 557.
Leonard vs. Rogan, 20 Wis., 540, 542.
Hopkins vs. Gilman, 22 Wis., 476, 481."

In view of the foregoing, how can it properly or seriously be said that this judgment *as to claim of riparian right, as to laches, as to the statute of limitations is void and waste paper? Certainly* the trial court had and has jurisdiction of *the subject matter* of nuisances, diversion of water, etc. *Certainly* it had jurisdiction of the persons and parties, because those whose rights were challenged, all submitted, answered and litigated stubbornly. *Certainly the proofs*, if not the stipulated facts, showed the ownership of the lands from which the water was diverted to be in defendants in error. *Certainly the diversion is proved* as well as admitted, and is attempted to be justified, and there is nothing lacking to show jurisdiction. *Suppose* that the cross-bill was a technical *departure* or something like unto it in pleading? *Suppose* we might have demurred to it? *We did not, we took issue squarely* and tried it out, can the plaintiff in error now be heard to say that the whole proceedings in that regard are waste paper? I think not. At the time this pleading was filed and trial had, we, here in Wisconsin, had no statute or rule of court affirmatively permitting or providing for a cross-bill, but we stipulated that it should be so treated. This pleading, so far as all the defendants except the plaintiffs in the original suit were concerned, was, if anything technical, a cross-complaint. No summons was necessary, defendants answered, and the issues being tried and disposed of are at rest.

Our Supreme Court, *on our appeal* from an order allowing this cross-complaint to be amended, 79 Wis., 331, (our contention being that it contained no cause of action as against defendants therein) in opinion by Cole, C. J. at page 333, says: "The amended answer (cross-complaint) is but little more than an enlargement or expansion of the matter stated in the original answer, which the appellants in effect consented, might be filed. There may be some additional defensible matters in it. It is very lengthy, and after reading it carefully more than once, I do not feel safe in asserting

what it does or does not contain. * * * * We decline at this time to consider the sufficiency of any defense set up in it or in the original answer. All such questions may more properly be determined on a demurrer to the answer."

We did not demur, but the character and sufficiency of the pleading was decided by the Supreme Court upon final hearing and is found in the judgment brought up by this writ of error.

In Wisconsin it is held that if in an action, in equity, to foreclose a mortgage a defendant, sets up an adverse, independent title to the property being foreclosed upon, entirely hostile to mortgagor, under claim that the title was not in the mortgagor when the mortgage was made, or at any other time, as to which claimed title, the party defendant setting it up was entitled to a jury trial in an action at law, and as to which defense the plaintiff, under our decisions, might have demurred, yet, when there was no demurrer, but plaintiff met the tendered defense upon the merits and prevailed after full trial before the court, the judgment was conclusive.

Barton vs. Babcock, 28 Wis., 192, 196. From this it appears that when a party has submitted his case to the court, which has jurisdiction of the subject matter thereof, and has fully litigated it, and finds himself defeated, he cannot "right about face" and be heard to complain that he has been deprived of his supposed rights without due process of law, simply because *the form of the submission* as by this cross-bill, was not technically correct.

DAVID S. ORDWAY,

Attorney for defendants in error, Hewitts, and of Counsel for the Kaukauna Water Power Co.

No. 190.
Brief of Fish & Cary for D.

JAN 10 1898
JAMES H. McKENNEY

SUPREME COURT OF THE UNITED STATES.

Filed Jan. 10, 1898.

October Term, 1897.

No. 190.

THE GREEN BAY AND MISSISSIPPI CANAL COMPANY, PLAINTIFF IN ERROR,

vs.

KAUKAUNA WATER POWER COMPANY, MATTHEW J. MEADE, HARRIET S. EDWARDS, MILWAUKEE, LAKE SHORE AND WESTERN RAILWAY COMPANY, G. LIND, JOSEPH CARLSON, BROKOW PULP COMPANY, BADGER PAPER COMPANY, B. AYMAR SANDS, JOSEPH KLINE AND MICHAEL HUNT, IMPLEADED WITH THE PATTEN PAPER COMPANY (LIMITED) AND OTHERS, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF OF DEFENDANTS IN ERROR ON THE MERITS AND ALSO ON MOTION TO DISMISS.

JOHN T. FISH,
ALFRED L. CARY,
Counsel for said Defendants in Error.

SUNDICK, ARMITAGE & ALLEN, PRINTERS, MILWAUKEE.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF OF DEFENDANTS IN ERROR ON THE MERITS AND ALSO ON MOTION TO DISMISS.

As the consideration of the motion of defendants in error to dismiss the writ of error has been postponed by the court until the hearing of the cause on the merits, we will unite with our brief on the merits additional suggestions upon the motion to dismiss.

Our brief already filed on the motion to dismiss contains a statement of the history of the cause and of the issues involved, which we deem sufficient for the purposes of this brief, coupled with such additional references to the record as we may make in connection with the points presented.

FINAL JUDGMENT.

The only judgment that can be considered or reviewed upon this writ of error is that entered by the Superior Court of Milwaukee County, on the 27th day of September, 1895, (Transcript pp. 554-556) pursuant to certain mandates of the Supreme Court of the state. That is the final judgment in the cause and of the court of last resort, because entered by the lower court by and pursuant to the direction of the highest court of the state.

The record sought to be made herein by plaintiff in error subsequent to the entry of that judgment by its appeal therefrom, (Transcript p. 571) which was dismissed by the State Supreme Court, for that the judgment appealed from was its judgment (Transcript p. 578), by its motion to reinstate the appeal which was denied, and by its further motion to re-enter the order dismissing the appeal, which also denied (Transcript pp. 581-593), has no place here, especially upon the question of the jurisdiction of this court. As to that question such a record must rank the same as that made by a motion for a rehearing, which cannot be used in support of the jurisdiction.

Loeber v. Schroeder, 149 U. S., 580, 585, and cases cited.

JURISDICTION.

It is contended, among other things, that plaintiff in error is deprived of its property, viz: its water power rights appurtenant to the north shore below the dam, and which it claims to own as the alleged owner of said north shore from said dam to a point below the mouth of said middle channel,

by the said judgment entered September 27th, 1895, and this without any jurisdiction in the Supreme Court of Wisconsin to so adjudge, because (as they claim) the title to said water power rights was not in issue, but was conceded to be in plaintiff in error by the other parties to the suit.

Our answer to this contention and these claims is as follows:

(a) Judgment does not deprive plaintiff in errorf of riparian rights below dam.

Said judgment does not deprive plaintiff in error of any water power or riparian rights that it may have as the owner of land bordering the north shore of said river or the shores of any of its channels below said dam, but concedes and assures to all of the riparian owners below said dam upon both banks of the river and upon the banks of its several channels, including plaintiff in error, all of the water power and other riparian rights which they as such owners of said banks can have and enjoy at the common law.

The asserted right or claim of plaintiff in error to draw water from the pond above said dam through the government canal on the north side to a point below the mouth of the middle channel is *something beyond and in contravention of any riparian right that it has at common law as owner of the shores below said dam*, and if such right exists it must be either by *license, grant, prescription, or public right*, or the like.

It is first decreed by said judgment (Transcript p. 555) that all of the water of the river, except that required for purposes of navigation, should be divided between and should of right flow down the said south, middle and north channels of said river, respectively, in certain designated proportions, and that each of the parties to the action be forever enjoined from interfering with the waters of said river *so as to prevent their flowing into said channels in the proportions named.*

This part of the judgment does not deprive any riparian owner upon the river below the dam of any of his rights as such, but only defines and regulates such rights as to the said several channels. It is within the scope of the original action and of the relief prayed for therein. We quote from the prayer of the amended complaint in the original suit (Transcript p. 121) as follows:

> "Wherefore these plaintiffs pray judgment of this "court.
>
> "First. Determining and adjudicating what share or "proportion of the ***entire natural flow*** of said Fox river "is appurtenant to and of right should be permitted to "flow in the south, middle and north channels of said "river respectively."

Said complaint alleged that all parties interested in the amount of water appurtenant to said channels where same passes Islands Nos. 3 and 4 were named as plaintiffs or defendants therein and such was the fact. (Transcript p. 121.)

The opinion of the State Supreme Court, in sustaining orders of the lower court overruling the demurrers of certain of the defendants to said complaint, held that the relief prayed for as above was within the scope of the action. We quote from such opinion (Transcript pp. 46 and 47) as follows:

> "In addition to the relief claimed against the Kau- "kauna Water Power Company and those claiming un- "der them, this court is asked to settle and determine "what share or portion of the flow of the water of said "river where the same passes Islands 3 and 4, in township "No. 21, north of range 18 east, is appurtenant and of "right should flow in the south, middle and north chan- "nels of said river respectively.
>
> "If the complaint states facts which entitles the plain- "tiff to this relief, ***and that it does is shown by the cases "above cited,*** then it is evident that in order to settle the "rights of the respective owners of the water rights in "said channels, all persons interested in the water rights "in said channels or in either of them are proper

"parties to the action. *If it be urged that the plaintiffs "are only interested in having it settled as to what "volume of water should of right flow in the middle "channel,* the answer to that proposition is *that the set- "tlement of that right will necessarily affect the rights "of the owners of the water power in the other chan- "nels. The individual rights are so connected that one "cannot be settled without affecting all the others.*"

It was thirdly decreed by said judgment (Transcript, pp. 555 and 6), that plaintiff in error, its successors and assigns, should so use the water power, if at all, *created by said dam,* as that all the water used for water power or hydraulic purposes should be returned to the stream in such manner and at such place as not to deprive the appellants or those claiming under or through them of its use *as it had been accustomed to flow past their banks,* and that it should flow past the lands of said appellants on said river and in the several channels of said river below said dam as it was accustomed to flow, and that said appellants have the right to use the water of said river, except such as is or may be necessary for navigation, as it was wont to run in a state of nature without material alteration or diminution.

The plaintiff in error owned the water power created by the Kaukauna dam with the same rights and privileges as to its use as the owner of both banks of the river would have to the power created by a dam constructed by him across the river from bank to bank, and no further or greater. The said third adjudication was to the effect that it should so use said water power, if at all, as that the common law rights of the riparian owners on the river below said dam should be observed and protected. *It did not deprive the plaintiff in error of any of its riparian rights below the dam.*

The common law rule upon this subject is so clearly stated by Newman, J., in the opinion of the State Supreme Court in this case and, in accordance with which said judgment was entered, that we will quote it. (Transcript p. 544.)

"The ordinary rule governing such questions would

"no doubt require the person owning or controlling the "Kaukauna dam and the water power created by it to so "use his rights as that *the water should be returned to "the stream in such a manner and at such a place as not "to deprive a lower riparian owner of its use as it had* "been accustomed to flow past his banks; for, as said "by Lyon, J., in The Kimberly & Clark Co. v. Hewitt, "79 Wis. 334. 'the rule is elementary that unless affected "by license, grant, prescription, or public right, or the "like, every proprietor of land on the bank of a stream of "water, whether navigable or not, *has the right to use the "water as it is wont to run without material alteration "or diminution*, and no riparian owner has the right to "use the water of the stream *to the prejudice of other "riparian owners above or below him by throwing it "back upon the former or subtracting it from the "latter.*'"

(b) Defendants Kaukauna Water Power Company and others have not conceded herein by their pleadings, or otherwise, that plaintiff in error is riparian owner of north shore below the dam, or that as such, or otherwise, it has the right to divert any part of the water of the river from its bed below the dam by passing the same from the pond above the dam through the Government Canal to a point below the mouth of the middle channel.

It was alleged by the plaintiffs in paragraphs 13, 14 and 15 of their complaint in the original action (Transcript p. 118) as follows:

"13. That the Green Bay & Mississippi Canal Com- "pany has a canal leading from said mill pond maintained "by said dam across Fox river above said island number "4, along in line with and north of the north bank of said "Fox river to a point below the head of said island num- "ber 3.

"That such canal is large enough to pass, and is in- "tended to pass, at least one-half of the flow of said

"river, and to pass the same down said canal and into "said river at a point below the head of island number "3, and so that the same cannot run and pass into the "said middle channel, and so that the same cannot come "into the mill pond formed between said islands num- "bers 4 and 3 by the dam from the one to the other, and, "during the past summer, has so passed about half the "flow of said stream, so that the same has not and could "not come into said mill pond between said islands num- "bers 3 and 4, called the Meade & Edwards water power.

"14. That the Green Bay & Mississippi Canal Com- "pany and its lessees and tenants are, and have for several "years been, and propose to, and will, continue, drawing "and passing through their canal on the north side of "said river from the mill pond maintained by the dam "above island number 4 to a point below the head of is- "land number 3 so that it cannot pass into said middle "channel and into the mill pond furnishing water to "plaintiffs' mills about half of the flow of the Fox river "and the half appurtenant to the said north channel.

"15. That the said United States of America owns "and controls said dam above island number 4 and the "canal on the north side of the river so far as necessary "for the maintenance of navigation, and the use of the "water of the river for that purpose, and that, subject to "such claim and interest, the Green Bay & Mississippi "Canal Company owns the same, that is, so far as neces- "sary for the maintenance and use of the same for hy- "draulic power subject to the paramount right of and for "navigation."

While the fact is here alleged that the Canal Company was, and had been for several years, and proposed to and would continue, drawing and passing through their said canal from the mill pond maintained by the dam to a point below the head of island number 3, so that it could not pass into said middle channel, about one-half of the flow of the Fox river, yet, there is ***no alleged right*** for it so to do, and ***none***

can be inferred except from the allegation that it was the owner of said canal.

This alleged ownership of the canal is traversed in the answer of the Kaukauna Water Power Company and others to said complaint, from which we make the following quotation: (Transcript p. 134)

> "And these defendants further answering say that "the canal mentioned in paragraphs 13 and 15 of said "complaint is owned by the United States of America "and that the Green Bay & Mississippi Canal Company "does own the same ***so far as is necessary for the main-***
> ***"tenance or use of the same for hydraulic power or "otherwise."***

This denial of the Canal Company's ownership of the canal negatives any ***inference of its right*** to draw water through the canal for hydraulic power arising from the allegations of the complaint above quoted.

Said plaintiffs, in the 27th paragraph of their said complaint, (transcript p. 121) alleged as follows:

> "27th. That that part of fractional section 24 "bordering on said north channel is owned by the Green "Bay & Mississippi Canal Company."

This referred to section 24 mentioned in the second paragraph of said complaint (transcript p. 113) and covered the north bank of said north channel from its mouth at the head of said island number 4 for a distance of about 600 feet down stream. This allegation of ownership of the north bank of said north channel was traversed in the answer of defendants, Kaukauna Water Power Company and others, as follows: (Transcript p. 136)

> "And these defendants deny that the part of said "fractional section No. 24 on said north channel of Fox "river is owned by the said Green Bay & Mississippi "Canal Company, and upon information and belief state "that the same is owned by the United States of "America."

If this denial is true, then the plaintiff in error was not a

riparian owner upon the north bank of said north channel so far as the same was covered by said fractional section 24, and the proofs and admitted facts sustain the denial.

The answer of plaintiff in error to said complaint admitted the said allegations thereof contained in said paragraphs 13, 14, 15 and 27, ***but such admission by a co-defendant of the Water Power Company did not conclude said company as to the matters alleged in*** said paragraphs. The allegations of said complaint covered by said admission were made and tendered by the plaintiffs therein and not by the Canal Company; ***therefore, the Water Power Company was not bound to traverse Canal Company's said admission in order to protect its rights in the premises as against that company.***

It is further contended by counsel for plaintiff in error that the defendant Kaukauna Water Power Company, in its answer to the cross-complaint of plaintiff in error, admitted that plaintiff in error had the title to the whole north shore of the river from a point above the Government dam down to lot 1 of Jennie's plat (which plat was wholly upon private claim No. 1, its up-stream boundary being about 1100 feet below the dam and its down-stream boundary at or near the first lock in canal) and of the undivided one-half of said north shore from the up-stream side of said lot 1 to a point a few rods below or down stream from the first lock now existing in the canal. The pleadings do not warrant the contention.

Plaintiff in error in its cross-complaint (Transcript p. 88) alleged that the Fox and Wisconsin Improvement Company in 1855 and 1856 acquired, by purchase and otherwise for the location of said dam and the canal thereon and for the utilization of water powers, certain lands, parcel of said fractional section 24 and of private claim No. 1, which so far as material to said action were particularly described as follows, to-wit:

> "Commencing at a point at the upper or western ex-
> "tremity of the canal at Kaukauna aforesaid and twenty
> "feet north of the northerly line of the canal; running
> "thence down along the bank of said canal and twenty
> "feet distant from the water line as aforesaid to the

"northerly line of the south half of private claim No. 1, "formerly owned by George W. Lawe; thence following "said northerly line of the south half of Lot 1 aforesaid "easterly to Fox river at low water mark; thence up "stream along the margin of the Fox river to the upper "extremity of the guard-lock at the head of the canal; "thence northerly to the place of beginning, such de- "scription embracing the towing path on the north side "of the canal (not including any buildings or other im- "provements erected thereon) and all the land within the "boundaries aforesaid lying between said towing path "and the Fox river, and including the bed thereof to the "middle thread thereof."

That owing to a defect in the title the interest so acquired in the lands aforesaid, which were parcel of said private claim No. 1, while nominally the whole interest, was in fact only the undivided half interest; that the lands so acquired subsequently passed from the said Fox and Wisconsin Improvement Company to the plaintiff in error about August 18, 1866. (Transcript p. 94.)

The answer of defendant Kaukauna Water Power Company and of certain other defendants claiming under it contains this allegation or admission: (Transcript p. 163.)

"And these defendants further state that ***at the time "of the making of all the aforesaid leases*** the Fox and "Wisconsin Improvement Company or the Green Bay "and Mississippi Canal Company were the owners of all "of the land bordering on the north side of said Fox "river from above said Government dam down to said "lot 1 of said Jennie's plat, and were also the owners of "the undivided half of all of the land bordering the north "side of said Fox River from the up-stream line of said "lot 1 of said Jennie's plat down stream to a point a few "rods below or down stream from the first lock now "existing in said canal and below where all of the water "so leased was then and is now taken from said Govern- "ment canal and discharged into the Fox river."

The leases referred to are set forth in the paragraph of said answer next preceding the one quoted and were alleged to have been made at the following dates: one ***June 3, 1861***, one in or about the ***year 1868***, one about ***May 1, 1869***, and one in ***November, 1880;*** so that the said admission of title was limited and confined to these dates.

At the end of the first division of said answer of the Kaukauna Water Power Company and others, which related to the first counter-claim in said cross-complaint, (Transcript p. 165) is the following general denial:

> "Said defendants deny each and every material allega-
> "tion contained in the first counter-claim of said cross-
> "complaint or answer not hereinbefore specifically an-
> "swered unto, admitted or denied."

This general denial put in issue the alleged title of the plaintiff in error to the north shore of the river contained in the first counter-claim of its cross-complaint, except as qualified by the said admission in said answer.

Plaintiff in error alleges in its first counter-claim of said amended cross-complaint, (Transcript p. 98) that on the 18th day of September, 1872, it made a conveyance to the United States, a copy of which was annexed to its original answer herein marked "A," and that it was made a part of said amended cross-complaint.

We claim and shall hereafter show that by this conveyance plaintiff in error parted with all of its title to the north shore of the river from a point above the dam to a point over 1100 feet below said dam and covering over 600 feet of the north shore of said north channel. If such was the effect of said deed said plaintiff in error, by its own pleading, alleged and showed that it had no title to that part of the north shore of said river last above referred to and therefore had no interest therein as riparian owner.

(c) Plaintiff in error not the owner of north shore.

The proofs show that plaintiff in error, since its said conveyance to the United States in September, 1872, has

never been the owner of the north shore of said river ***from a point above said dam to a point more than 1,100 feet below said dam,*** and therefore, as to that part of the said north shore it was and is not the owner of any riparian rights appurtenant thereto or parcel thereof.

It was admitted by the parties to this action, including the plaintiff in error, and as testimony upon the issues raised by said cross-complaint and the answers thereto (Transcript pp. 330, 331, 334) as follows:

> "From that point a dam or cross-dam was built ex-
> "tending across the river in a northeasterly direction and
> "reaching almost, if not quite, to the north bank of the
> "river. From this point (meaning from said dam) a
> "stone wall and embankment was carried down river
> "nearly parallel with the north bank of the river and
> "about half the breadth of the canal out in the stream,
> ***"so that about half of the canal lay in the river and about***
> ***"half in or upon the bank.*** At a point about 1100 feet
> "below the north end of this dam or cross-dam this wall
> "and embankment struck the north bank of the river and
> "from thence it and the canal extended in-shore on the
> "solid land north of the river a distance of about a mile
> "and a half where they struck the river below the Kau-
> "kauna Rapids."

The part of this admission that we desire to make use of here is, that about one-half of the canal from the dam to a point about 1100 feet below the dam was in the river, and the other half in or upon the bank, ***so that said canal covered and included the north shore-line of said river for a distance of about 1,100 feet below said dam.*** This fact was also established by the testimony of a number of witnesses in the case, and notably so by the testimony of N. M. Edwards, an engineer, at page 215 of Transcript, and by the testimony of George W. Lawe, at page 378.

Exhibit "A," referred to in the first counter-claim of the amended cross-complaint of plaintiff in error, and being the deed from plaintiff in error to the United States of America,

dated September 18, 1872, is found at page 58 of Transcript.

By this deed plaintiff in error conveyed (Transcript p. 60)

"All and singular, its property and rights of property, in "and to the line of water communication between the "Wisconsin river aforesaid and the mouth of the Fox "river, ***including its locks, dams, canals*** and franchises, "saving and excepting therefrom," etc. * * *

"First. All of the personal property," etc. * * *

"Second. Also all that part of the franchises of said "company, viz: ***the water powers created by the dams*** "(not canals) and by the use of the surplus waters not "required for the purpose of navigation, * * * * * "and the lots, pieces or parcels of land necessary to the "enjoyment of the same and those acquired with refer- "ence to the same."

By this deed plaintiff in error conveyed to the United States, absolutely and without any exception or reservation, the canal in question and all the land upon which the same was located and all land connected therewith, at least, from said dam to the point where said canal leaves the river-bed and extends inland, being over 1100 feet below said dam. ***This covered its title to the north shore of said river for such distance and all of its riparian rights appurtenant thereto and parcel thereof.*** As to this part of the canal plaintiff in error had no lots, pieces or parcels of land necessary to the enjoyment of water powers ***created by the dam and which had been acquired with reference to the same.*** This is evident from the fact that for this distance the canal occupied a part of the river-bed; hence the exception or reservation in the deed did not apply to any lands that were parcel of or connected with this part of the canal.

"It is the settled law of Wisconsin, announced in re- "peated decisions of its Supreme Court, that the owner- "ship of riparian proprietors extends to the center or "thread of the stream, subject if such stream be navi- "gable, to the right of the public to its use as a public "highway for the passage of vessels."

This language is quoted from the opinion of the court in ***Kaukauna Co. vs. Green Bay etc., Canal Co.***, 142 U. S. 254, at 271 and many Wisconsin cases are there cited in support of it.

(d) State Supreme Court had jurisdiction to render judgment.

It is further contended in behalf of plaintiff in error, that the judgment in question was rendered by the Supreme Court of the state ***coram non judicie***, because not within the appellate jurisdiction of said court under the several notices of appeal given by the defendants in error, who appealed from the former judgment of said Superior Court to said Supreme Court, and also because said judgment was not within the scope of the issues presented in said action.

Plaintiff's amended complaint (Transcript pp. 112-121) (amended at the trial in the Superior Court as to the first subdivision in the prayer for judgment) presented two grounds for relief:

1st. An adjudication of what share or proportion of the ***entire natural flow*** of the river was appurtenant to and of right should be permitted to flow in the south, middle and north channels of said river, respectively, and

2nd. Restraining the defendant, Kaukauna Water Power Company, and all persons and corporations claiming under it from diverting certain water from the middle channel.

Said complaint contained appropriate allegations for granting both classes of relief asked and all persons and corporations owning land bordering upon the shores of said three channels were made parties to the action. The complaint showed ***that the Kaukauna Water Power Company was a very substantial owner of lands bordering the shores of each of said three channels,*** its ownership upon the north channel being upon the south side thereof.

As very aptly stated in the opinion of the State Supreme Court in the appeals from orders of the lower court overrul-

ing several demurrers to said complaint (Transcript p. 47), any determination as to what volume of water should of right flow in the middle channel, would necessarily affect the rights of the owners of the water power in the other channels. The individual rights were so connected that one could not be settled without affecting all the others.

Issue was joined between said plaintiffs and the defendants, Kaukauna Water Power Company and other defendants claiming under it as to the volume of water which should of right flow in each of said channels. Upon such issue it was competent for the court to determine what part of the ***entire natural flow*** of said river should flow down said three channels, respectively, and to enforce its determination by enjoining all the parties to the action from interfering with the waters of the river so as to prevent their flowing into said channels in the proportions determined by the court. Such an injunctional order would be germane to the relief asked and granted for a division of the water and without any special prayer therefor. It was so considered by plaintiff in error, for in the judgment entered by the Superior Court in its favor, adjudging that only so much of the water of the river as it might ***graciously*** permit to flow over the dam or into the river above Island No. 4, should be divided between the channels in the proportions named, it also caused to be entered a provision enjoining all the ***other*** parties to the action from interfering with the waters of the river so divided so as to prevent their flowing into said channels in the proportions named. (See 3rd subdivision of said judgment, Transcript p. 195). This injunctional order was incorporated in said judgment without any prayer therefor, either in the original complaint or in plaintiff's cross-complaint.

Section 2886, Revised Statutes of Wisconsin, is as follows:

> "The relief granted to the plaintiff if there be no answer, cannot exceed that which he shall have demanded "in his complaint; but in any other case the court may "grant him any relief, consistent with the case made by "the complaint and embraced within the issue."

It has been decided by the Supreme Court of Wisconsin, that where the relief asked cannot be granted in equity, the court will retain the cause in order to grant such relief ***as the facts pleaded and found authorize***, including any relief consistent with the case made by the complaint and within the issue.

Hopkins vs. Gilman, 22 Wis., 476.
Tenney vs. State Bank, 20 Wis., 152.
Leonard vs. Rogan, 20 Wis., 540.
Straebe vs. Fehl, 22 Wis., 337.

It has also held that the omission of the prayer in a bill in equity is not a ***jurisdictional defect***, though demurrable.

Supervisors vs. R. R. Co., 24 Wis., 93, 122.

Said court has further held, that where the relief granted is consistent ***with the facts proved but not pleaded***, a failure to amend the complaint to conform to the facts proved is no ground for a reversal. For the purpose of sustaining the judgment, the complaint will be deemed amended.

Forey vs. Leonard, 63 Wis., 353, 361.

Plaintiff in error was made a party defendant to such action, as owner of lands bordering on the said south, middle and north channels. It interposed a cross-complaint in said action against said plaintiffs and its co-defendants, in said action, (see stipulation, Transcript pp. 61 and 2) wherein it set up and made the broad claim that it was, as the grantee of the state, the exclusive owner of all the water power created by the dam in question and its said alleged extension, being the Government canal from the pond created by said dam down to the first lock in said canal, subject only to the rights of navigation, and that it had the right to make exclusive use of said water power and the surplus water not required for navigation at any point on its own lands where the same could be made available, and particularly at points and places on said dam, including its extension to said lock oppo-

site Island No. 3 and the middle of Island No. 4, and prayed in said cross-complaint for the following relief: That any decree to be entered in the action determining and adjudging what share or proportion of the flow of said Fox river where the same passes said Islands Nos. 3 and 4 was appurtenant and of right should be permitted to flow in the south, middle and north channels of said river, respectively, should declare and be made subject to the right of said plaintiff in error to use ***all of the water power created by the said Government dam on its own lands on the north side of said river or elsewhere as it should see fit, and that the apportionment of the flow of the river so to be made should be confined to such part of the river, if any, as should not be so used, and should be permitted to flow in the channel of said river below said dam.*** (***Transcript p. 101.***)

This broad claim of plaintiff in error and its prayer for relief based thereon invaded the rights of every riparian owner upon the river from said dam down to and including said three channels, as an adjudication sustaining such claim and granting the said relief would have conferred upon said plaintiff in error the ***right to divert all of the water from the bed of the river below the dam and from the beds of said channels.***

The defendant, Kaukauna Water Power Company, and the other defendants claiming under it, the plaintiffs in the original action, and the two defendants, Hewitt, traversed the said claim made by plaintiff in error in its said cross-complaint and the allegations therein upon which it was based in their respective answers to said cross-complaint, except that they conceded the paramount public right to use the waters of the river for the purposes of navigation and also the ownership by plaintiff in error of the water power incident to the dam ***across the river*** and its right to use such water power at the dam, or so near the same as not to impair their just rights as riparian owners below the dam.

The trial of the issues thus joined, necessarily made it the duty of the court to determine where plaintiff in error should

use its surplus water power incident to the dam; that is, whether it had the right as claimed to draw all or any part of the surplus water, not required for navigation, creating such power, through the Government canal on the north side of the river, or through other artificial channels, and use it for power on its own lands below the lands of other riparian owners on the river below the dam *or elsewhere as it saw fit*, or whether it must use said surplus water power at the dam or so near the dam as not to impair the rights of the other parties to the action as riparian owners below said dam. Such rights as plaintiff in error had as riparian owner below the dam were necessarily *included or merged* in the broad claim which it thus set up as grantee of the state, because the establishment of such claim would have given it the power to defeat its own as well as all other riparian rights below the dam by diverting all the water of the river and drying up its bed.

After plaintiff in error, by its cross-complaint, *voluntarily* tendered the issue of its asserted right to divert the whole or any part, at its pleasure, of the natural flow of the river from all or any of the channels below the dam, and such issue was met by the defendants, testimony taken, trial had and a decision rendered thereon adverse to plaintiff in error, it is too late for it now to claim that such issue or any part thereof was not properly made or tendered by its cross-complaint. *Neither will it now be heard to say that the broad issue tendered by its cross-complaint was not germane to or within the scope of the original action.* Courts will not permit litigants to trifle with them in this way.

(e) The Supreme Court of the State had jurisdiction to render the judgment in question upon the notices of appeal which were given by several of the defendants from the judgment of the Superior Court of Milwaukee County, rendered January 19, 1894.

By that judgment (Transcript pp. 194-196)' it was adjudged:

1st. That the plaintiff in error was the owner and entitled as against all of the parties to the action and their successors, heirs and assigns to the full flow of the river not necessary for navigation from the said upper or Government dam across the Fox river at Kaukauna, and *was not obliged to permit any of the water of the river or pond to flow over the dam, but was entitled to withdraw from the pond made by said dam, all of the surplus waters not necessary for navigation, either through the canal extending from the pond to slack water below the rapids, or directly from the pond, and use the same from said canal or said pond and let such water to others to be used wherever it might be available for water power, and was not obliged to permit any of the water from the river or pond to flow over said dam.*

2nd. That all and singular the parties to the action be forever enjoined from interfering with the plaintiff in error in so withdrawing and using such water.

3rd. That all of the water of the river which was permitted by plaintiff in error to flow over the upper dam or into the river above Island No. 4 so as to pass down the river, should be and it was thereby divided and apportioned between the plaintiffs and their successors and assigns, the Kaukauna Water Power Company and its successors and assigns and the plaintiff in error and its successors and assigns, between and to the south, middle and north channels of the river in the following proportions: (Here follows the proportion designated as to each of said channels.)

And each of the other parties to the action, (meaning all except plaintiff in error) *their heirs, successors and assigns, were forever enjoined from interfering with the waters of said river so permitted to flow over the dam or into the river above Island No. 4, so as to prevent their flowing into said channels in the proportions designated.*

4th. That nothing in said judgment contained should in any wise conclude the plaintiff in error from recovering against the Kaukauna Water Power Company compensation for water which it had theretofore drawn or should there-

after withdraw from the pond created by said upper dam with the assent of said plaintiff in error.

5th. That plaintiff in error have and recover of the plaintiffs in the original action, the Kaukauna Water Power Company and the two Hewitts, defendants, the sum of two hundred and fifty-eight dollars and ninety cents, as and for its costs and disbursements upon the issue made by its said answer and cross-complaint, and

6th. That the plaintiffs in the original action have and recover of and from the defendant, Kaukauna Water Power Company, the sum of two hundred and forty-nine dollars and forty-four cents, as and for its costs and disbursements upon the issues made by the complaint for the partition and division of the waters of the Fox river.

The three notices of appeal from this judgment are found on pages 532 to 536 of Transcript. That given by the plaintiffs in the original action was from all and every part of said judgment, excepting the sixth subdivision thereof, and also excepting so much of the third paragraph of said judgment as specified the proportions in which the water flowing in the Fox river should be permitted to flow in the various channels of said river, but they did appeal from that part of said third paragraph which limited the division to such water as the plaintiff in error might permit to flow over the dam, etc. That given by the defendants, Kaukauna Water Power Company and others was from so much of said judgment as was contained in the *first*, *second* and *fourth* subdivisions thereof, and also so much of the *third* subdivision of said judgment as limited the division of the water among the several channels in said river named in said third subdivision to so much of the water of the river as was or should be permitted by said plaintiff in error to flow over the upper dam or into the river above Island No. 4, so as to pass down the river, and also from that part of said judgment embraced in the *fifth* subdivision thereof which adjudged, that the plaintiff in error have and recover of the Kaukauna Water Power

Company and certain other parties to the action the sum of two hundred and fifty-eight dollars and ninety-one cents as and for its costs and disbursements upon the issues made by its said answer and cross-complaint in said action. That given by the two Hewitts was from the first, second and fifth subdivisions of said judgments and also from all parts of said judgment which limited in favor of said plaintiff in error and as against said defendants the amount of water apportioned between the three channels of said river to that which was permitted by the plaintiff in error to flow over the upper dam or into the river above Island No. 4, so as to pass down the river.

These notices brought to the State Supreme Court for review all parts of the said judgment based upon and which adjudged in favor of the plaintiff in error the broad claim which it set up in its said cross-complaint. The only part of the judgment not appealed from, was that which designated the proportions of the flow of the river down said three channels, respectively, and also the sixth subdivision giving costs to the original plaintiffs against the water power company, but that part which limited such flow to the water which plaintiff in error should permit to flow over the dam and down the main channel was covered by the notices and appealed from.

These notices therefore gave the State Supreme Court full and complete jurisdiction *to re-try the case upon the merits* as to the issues raised by the cross-complaint and the several answers thereto, to determine where plaintiff in error should use the water powers belonging to it created by the dam; also whether or not it was entitled to draw all or any part of the water of the river through the Government canal for hydraulic purposes; also whether the water to be apportioned between the three channels below the dam should be that of the whole natural flow of the river or only such part thereof as plaintiff in error should permit to flow over the dam and come down the main channel; and also to make the injunctional order in the judgment preventing any interference with its adjudicated division of the water as to the chan-

nels applicable to the plaintiff in error, as well as the other parties to the suit, and in fact it had jurisdiction to do everything which it did do on these appeals and to render the judgment which it did render thereon. Section 3071, Revised Statutes of Wisconsin, provides among other things as follows:

> "In all cases the Supreme Court shall remit its judg-
> "ment or decision to the court from which the appeal or
> "writ of error was taken, to be enforced accordingly;
> *"and if from a judgment final judgment shall thereupon be*
> *"entered in the court below in accordance therewith, except*
> *"where otherwise ordered."*

In *Whitney vs. Traynor*, 76 Wis., 628, at p. 630, the court said: "On such appeal, (referring to an appeal in
> "an equitable action) this court not only corrects any
> "errors which may have been committed by the trial
> "court, but *it re-trys the case upon the merits* and so in-
> "dicates in its decision the judgment which should be
> "entered therein by the court below."

In *Stevens vs. Clark County*, 43 Wis., 36, at p. 41, the learned Chief Justice Ryan says: "When judgment in a suit
> "in equity is reversed, *it rests in the discretion of the*
> *"court to direct final judgment* for the successful party,
> "or in proper cases to direct a new trial, or in doubtful
> "cases to remit the question of a new trial to the discre-
> "tion of the court below. Dupont vs. Davis, 35 Wis.,
> "631, Law vs. Grant, 37 Id. 548, McWilliams vs. Ban-
> "nister, 40 Id. 489. And even this discretion in equity
> "cases upon reversal, the court takes by statute." (The statute referred to is Section 3071 above quoted.)

(f) Decision of State Supreme Court as to jurisdiction and practice under State laws binding upon this Court, unless such laws violate Federal constitution, laws, or treaties.

Counsel for plaintiff in error challenged the judgment in question as not being due process of law solely upon

the ground that it was not had or rendered according to the settled course of judicial proceedings as regulated by the laws of the state of Wisconsin and the practice of its courts. They do not claim that the state court did not have jurisdiction of the parties or of the subject matter of the action.

In *Kennard vs. Louisiana*, 92 U. S., 480, it was claimed that the state of Lousiana, acting through her judiciary, had deprived Kennard of his office without due process of law and this court in its opinion at page 481 said: "It is sub-

> "stantially admitted by counsel in the argument that "such is not the case, if it has been done, 'in the due course "of legal proceedings, according to those rules and "forms which have been established for the protection of "private rights.' We accept this as a sufficient defini-"tion of the term 'due process of law,' for the purposes "of the present case. The question before us is not "whether the courts below, having jurisdiction of the "case and the parties, have followed the law, but whether "the law, if followed, would have furnished Kennard the "protection guaranteed by the Constitution. *Irregu-"larities and mere errors in the proceeding can only be cor-"rected in the State Courts.* Our authority does not "extend beyond an examination of the power of the "courts below to proceed at all."

In *Walker vs. Suavinet*, 92 U. S., 90, this court said at page 93: "Due process of law is process due according to

> "the law of the land. *This process in the states is regu-"lated by the law of the state.* Our power over that "law is only to determine whether it is in conflict with "the supreme law of the land,—that is to say, with the "Constitution and laws of the United States made in "pursuance thereof, or with any treaty made under the "authority of the United States. Art. 6 Const. Here "the state court has decided that the proceeding below "was in accordance with the law of the state; and we do "not find that to be contrary to the Constitution, or any "law or treaty of the United States."

It is not claimed that the laws of the state regulating the jurisdiction of and the practice in its courts, touching the matters herein complained of, were in conflict with the Federal Constitution, or with any Federal laws made in pursuance thereof, or with any treaty made under the authority of the United States (Article 6, Fed. Const.); hence this court should consider itself bound by the decision of the Supreme Court of the State, if such decision it made, as to its jurisdiction to render the judgment which it did render herein, as to whether said judgment was within the scope of the issues presented in the action, and as to whether the judicial proceedings which resulted in said judgment were had in accordance with the settled course of such proceedings as regulated by the laws of the state and the practice of its courts, *otherwise this court might be called upon to review every judgment of the court of last resort in the state.* If the questions raised here in support of the jurisdiction of this court were not properly called to the attention of the Supreme Court of the State and decided by that court they cannot now be raised and considered here.

(g) Judgment of this Court in former suit (142 U. S., 254) did not determine any rights determined by the judgment now in question.

It is further contended in behalf of plaintiff in error, (see brief of Mr. Stevens on motion to dismiss) that by the judgment in question the state court refused to give effect to the judgment of this court, in Kaukauna Water Power Company and others vs. Green Bay and Mississippi Canal Company, reported in Volume 142 U. S. Reports, at page 254, affirming the judgment of the Supreme Court of the State of Wisconsin, reported in 70 Wis., 635, in that it was determined by said judgment now under consideration, that the dam at the head of the rapids at Kaukauna did not extend to the first or upper lock in the canal on the north side of the river, but only embraced the structure across the river extending from Lot 5 on the south side of the river to fractional

Section 24 on the north side of the river, and in restricting the use by plaintiff in error of the water power created by said dam by the surplus water not required for the purposes of navigation to said dam or so near the same as not to injure the rights of riparian owners on the river below the dam.

The judgment in said former suit as affirmed by this court did not relate to or determine any rights of any of the parties thereto below the said Kaukauna dam, as we shall show by said judgment and the record in that suit, and therefore did not relate to or cover any of the rights of property determined by and involved in the judgment in this suit.

The record in said former suit was put in evidence in this suit as will appear from the following quotation from the bill of exceptions herein: (Transcript p. 336.) "It is agreed "that the printed pamphlet containing the judgment of "the Circuit Court dismissing the complaint and opin- "ion of the Supreme Court reversing that judgment, and "judgment of the Circuit Court in conformity with the "opinion of the Supreme Court, and opinion of the Su- "preme Court of the United States affirming that judg- "ment be in evidence, together with the pleadings in the "action of The Green Bay and Mississippi Canal Com- "pany against The Kaukauna Water Power Company "et al."

The transcript of record in this court in that suit is entitled The Kaukauna Water Power Company and others, plaintiffs in error, vs. The Green Bay and Mississippi Canal Company, and is No. 701, October Term, 1889.

We make the following quotations and references to that record for the purpose of showing the scope of the judgment of this court therein.

At pages 96-98 of said record, we find the judgment entered by the Circuit Court of Outagamie County, Wisconsin, pursuant to the mandate of the Supreme Court of the State and in accordance with its opinion as reported in 70 Wis., 635, and which was the judgment brought up for review by this court. We quote from said judgment as follows:

"Now, on motion of Moses Hooper, attorney for the "plaintiff, and pursuant to the said decision and opinion "of said Supreme Court, it is here by this court ordered "and adjudged that the defendants herein, (naming "them) * * * be and they hereby are perpetually en- "joined and restrained from drawing any water from "**the** *pond maintained by the dam across the Fox river* **in** "the City of Kaukauna, in the county of Outagamie and "State of Wisconsin, *resting upon the south side of said "river, upon lot (5), of section twenty-two (22), sovth of the "river, and upon fractional section twenty-four (24), on the "north side of the river, in town twenty-one (21) north, of "range eighteen (18), east of the fourth (4th) Principal Merid- "ian, mentioned in the complaint, for hydraulic power.*

"It is also further considered and adjudged that the "plaintiff is the *legal owner of the water power created by "such dam over and above what is required for navigation.*"

For the purpose of giving construction to said judgment, if need be, we make certain quotations from the complaint of the Canal Company, plaintiff in said former suit and plaintiff in error here, which complaint appears in said record at pages 1-13:

"That in the prosecution of the work of said im- "provement, in order to secure slack water navigation "around said rapids, the State of Wisconsin did, between "the 8th day of August, 1848, and the 6th day of July, "1853, build a *dam at the head of said rapids*, so as to raise "the water upwards of eight feet above the natural level *"reaching from lot five (5), section 22, south of the river, "to section 24, north of the river* in said town and range, *"and did build a canal and locks on the north side of the "river, reaching from the pond created by said dam to the "slack water of said river below the rapids and below said "dam.*

"That the building and maintenance of said *dam, canal "and locks* were necessary to the completion of the works "contemplated by the act of the United States making

"such grant of land as above mentioned, and was a part "of the purpose for which said lands were granted.

"That said dam was built and maintained under the "authority of said act of the State of Wisconsin, ap- "proved August 8, 1848, and amendatory acts, provid- "ing for the completion of such improvement, and that "there is no other authority for building or maintenance "of the same." (Page 3.)

* * * * * * * * * * * * * * *

"That this plaintiff is the owner of and entitled to "the exclusive use and control of the water power or "hydraulic power *supported and maintained and furnished by "the above mentioned dam across Fox river*, subject only to "the right of the United States Government to draw only "so much water therefrom as is necessary to fill the *canal* "on the north side of said river, *leading from the pond above "said dam to the river below said dam*, for the purposes of "navigation only, as specified in said conveyance from "this plaintiff to the United States. (Page 9.)

* * * * * * * * * * * * * * *

"That the dam which supports, maintains and fur- "nishes such hydraulic power rests on the south side of "said river on Lot No. 5 of the Government survey, and *"on the north side of said river upon lands in section 24."* (Page 9.)

These allegations of the complaint clearly show what the Canal Company considered to be dam and what canal in that case, and the judgment therein in this respect was responsive to the allegations made in the complaint. They all show that the dam involved in that case was the one which reached from Lot 5 on the south shore directly across the river to fractional section 24 on the north shore and none other. The claim made herein, that said dam extended to the first lock in the canal would carry its down-stream end to a point far beyond fractional section 24 and on or below private claim No. 1, and also to a point more than *2,300 feet below the north*

end of said dam as designated in the complaint and judgment in said former suit.

The maps offered in evidence in that case and which are found in the reports of the case, in 70 Wisconsin, at page 641, and in 142 U. S., at page 261, show the canal as commencing above the old dam, and also show the guard-lock at the head of said canal. The Supreme Court of Wisconsin in that case expressly limited its decision and judgment to the determination of rights at and above the dam by the following portion of its opinion quoted from 70 Wis., at page 657:

> "We do not here determine the relative rights of the "plaintiff and other riparian owners below the dam, in "respect to the use of the water which would run over "the dam if not taken from the pond into the canal; *nor "do we consider whether there is any restriction upon the manner "or place in which the water shall be returned to the river below "the dam.* We only hold that the plaintiff owns the sur- "plus water power *created by the dam*, and that the defend- "ants have no legal right, without the consent of the "plaintiff, to draw water from the pond with which to "propel the machinery."

This court in its decision in that case (142 U. S., 254) in no way or respect modified or extended the limitation thus placed by the Supreme Court of Wisconsin upon its decision, *but only affirmed the decree of the Supreme Court of Wisconsin.*

The judgment of this court in the former case only determined rights at and above the dam; the judgment in question here only determines rights below the dam and recognizes to the fullest extent those that were determined by this court in the former case.

The Patten Paper Company (Limited), Union Pulp Company and Fox River Pulp & Paper Company, plaintiffs herein, and the defendants Hewitt, are the owners of water power and riparian rights on the river below said dam. They were not parties to said former suit and hence are not concluded by the judgment therein.

We think it must be apparent to the court that there is no Federal question involved herein and therefore the writ of error should be dismissed.

MERITS.

Leading Facts.

In 1848, the State of Wisconsin accepted a grant of lands made by Congress in 1846, for the purpose of improving the navigation of the Fox and Wisconsin rivers and by an act of the legislature of said state entitled "*An Act* to provide for the improvement of the Fox and Wisconsin rivers and connecting the same by a canal," approved August 8th, 1848, it placed the construction, maintenance and operation of such improvement under the control of a board of public works. We quote from said act, Section 15 and a part of Section 16:

> "*Sec. 15. In the construction of such improvements the "said board shall have power to enter on, to take possession of "and use all lands, waters and materials, the appropriation "of which for the use of such works of improvement shall in "their judgment be necessary.*"
>
> "Sec. 16. * * * * * * * * * * *
> "*and whenever a water power shall be created by reason "of any dam erected or other improvements made on any of "said rivers, such water power shall belong to the state, subject "to future action of the legislature.*"

In the lower Fox river, from Lake Winnebago to Green Bay, there are and always have been rapids which were not in a state of nature navigable, and to secure navigation at such points the construction of dams and canals with locks was necessary.

One of said rapids is located at a point on said river known as Kaukauna, is about a mile in length and has a fall of about fifty feet. The river at this point flows nearly east and between Sections 21 and 22 south of the river, and Sec-

tion 24 and Paul Ducharme's private claim No. 1 and August Grignon's private claim No. 35 north of the river, all in Township 21 North of Range 18 East.

The plan adopted by the state through its board of public works for the improvement of the river for the purposes of navigation at this point consisted in the construction of a dam extending from a point on Lot 5 of said Section 22 on the south side of the river, directly across the river to a point on said fractional Section 24 on the north side of the river, and a canal leading from the north end of said dam down the north side of the river to slack water below, containing five lift-locks. For a distance of about 1100 feet below the north end of the dam about one-half the breadth of the canal was in the river and the other half in or upon the bank. In this part of the canal the outer or river side consisted of a stone retaining wall with an embankment of earth upon its inner side. At a point about 1100 feet below the dam said canal extended in-shore and on solid land until it reached slack water below the rapids; its entire length being about one and one-half miles.

The first lift-lock in the canal was about 2300 feet below the north end of the dam, measuring by the canal, and had a lift of about ten feet; the second lock was about 800 feet below the first and had a lift of about ten feet; the third lock was about 300 feet below the second and had a lift of about ten feet; the fourth lock was about 200 feet below the third and had a lift of about ten feet, and the fifth and last lock was about 1500 feet below the fourth, and near the foot of the canal, and had a lift of about ten feet. (Transcript pp. 334-5.)

A waste weir was constructed around each of said lift-locks, except the upper one, through which the surplus water which might accumulate upon any level of the canal by the use of the locks might pass to the next level and so on through the canal into the river below the rapids. No waste weir was constructed around the upper lift-lock, because the water of this level was wasted at the dam.

At the upper end of the canal and at its mouth near the north end of the dam a guard-lock was constructed, and for the declared purpose by the chief engineer in his report to the board of public works, of protecting the long line of canal between the dam and head of the first lift-lock. (Transcript pp. 350, 443 and 473.)

The canal, as determined by the board of public works, was to be so constructed that the water should be 44 feet wide on the bottom, 60 feet wide at the top water line and 4 feet at ordinary stages of water in the stream, with such slopes preserved on the inner and outer faces of the banks as the chief engineer having charge of the work might direct. The towing path should be 10 feet and the berm bank 8 feet wide on top; the inside angles of the banks should be from four to five feet, and the outside angles from three to four feet *above top water line.* (Transcript p. 351.)

These dimensions were specified in the contract made between the state and Morgan L. Martin, May 14, 1851, for the construction of all the locks, dams and canals necessary to complete the improvement of the navigation of the Fox river between Lake Winnebago and Green Bay, including the one in question. (See page 30 f. of compilation of laws and documents made by Green Bay and Mississippi Canal Co. in 1881 and referred to at page 336 of Transcript.)

This canal as thus planned would receive and carry just the water necessary to fill it for the purposes of navigation and to operate its locks in raising and lowering vessels from one level to another, it all being passed through the canal and its successive locks to slack water below the rapids.

The specifications for the dams to be constructed under the Martin contract, including the dam in question, are found at page 30 o. of said Green Bay and Mississippi Canal Company documents. Such specifications required the bed of the stream for a space of 40 feet in width and *extending from side to side* to be clear of all large stone in order to make a smooth level bed upon which to commence the construction

of the dam. The *banks of the stream* should also be prepared by making such excavations as might be deemed necessary by the engineer in order to obtain the *proper foundations for the abutments.* They also provided that *abutments of square timber should be built at each extremity of the dam,* the foundations of which should be sunk to a proper depth and secured in such manner as the engineer might deem necessary. Each abutment was to be at least 18 feet square and to be properly tied and bound together and to be filled with gravel and small stone with a proper mixture of loam or clay; the transverse timbers of the crib work of the dam to be let into and connected with the abutments in order to bind the work firmly together. The specifications also set forth particularly how the dam was to be constructed between these abutments. But it is not necessary to detail the same here, as the specifications already referred to show clearly *what was dam as distinguished from canal* in the plans adopted by the board of public works for the construction of the works of improvement, viz: that the dam was to be a structure extending across the river from bank to bank, at each end of which and in an excavation to be made in the bank of the river for the purpose was to be an abutment at least 18 feet square, and to which the crib work of the dam was to be connected so as to bind the whole work firmly together. The canal was to commence at north end of dam and was to run lengthwise of the stream and *not across it.*

The board of public works procured an easement in the lands on the north bank of the river for the landing of the north end of the dam and also for the location of the canal leading from the pond created by the dam down the north side of the river to slack water below the rapids, and also appropriated a portion of Lot 5 on the south bank of the river upon which to locate the south end of said dam, and also an easement along the shore ends of Lots 6 and 7 bordering the river on its south side above the dam for the construction of an embankment up stream from the south end of the dam, made necessary from the fact that the natural bank of the

river was low at this point and required such embankment to hold the water of the pond raised by the dam. Said board did not purchase, condemn, or appropriate any land below the dam on either bank of the stream, except the right of way for the canal as just stated, *and never acquired any land upon which to utilize any water powers created by the dam or other improvements at Kaukauna.*

Morgan L. Martin made a contract with the state dated May 14, 1851, for the construction of all the locks, dams and canals necessary to complete the improvement of the navigation of the Fox river between Lake Winnebago and Green Bay, which contract included the dam and canal to be built at Kaukauna, and such dam and canal were constructed and completed by him pursuant to said contract and in accordance with the specifications thereto annexed. (This contract is found at page 30 a. of Green Bay and Mississippi Canal Company documents.) Such contract was continued in force by the Fox and Wisconsin Improvement Company.

The flow of the Fox river was equal to a stream 600 feet wide, 2 feet deep, and with a velocity of 8 miles per hour. (Transcript p. 475.) The ordinary flow of the river was 300,000 cubic feet of water per minute and in low water 150,000 cubic feet per minute. (Transcript pp. 84 and 113.)

The total amount of water required to be used through the Government canal at Kaukauna as it is now constructed and used, for the purposes of navigation only, is not to exceed 1,000 cubic feet per minute. (Transcript pp. 341, 435, 436 and 441.)

The legislature of Wisconsin, by Chapter 283 of the laws of 1850, authorized the board of public works to dispose of water powers created by the improvement, provided that such water should be used so as not to *interfere with, hinder or obstruct* the navigation of said river. (See p. 28 of Green Bay and Mississippi Canal Company documents.)

Using the canal for hydraulic purposes does *interfere with, hinder and obstruct* navigation, and the use of such canal for hydraulic purposes to the extent claimed by the plaintiff in

error would make navigation impossible. (Transcript p. 282.)

The legislature of Wisconsin, by Chapter 98 of the laws of 1853, approved July 6, 1853, incorporated the Fox and Wisconsin Improvement Company and granted to it all the works of improvement, land and property of the state connected therewith, conditioned that such company should vigorously prosecute said improvement to completion and complete the same within three years from the passage of said act on the line located by the board of public works ***and as comtemplated*** in the report of the board of public works and as estimated by the Chief Engineer on the first day of January, 1853. (See Green Bay and Mississippi Canal Company documents p. 40.)

At the time of this grant to the Improvement Company, the State only had an easement in the lands occupied by the canal, dam and pond at Kaukauna. It owned no real estate below the dam and no easement in any, except that which was occupied by the canal. It therefore transferred none, and no water power excepting such as could be used by the state upon the property that it then possessed.

In August, 1855, the Improvement Company acquired an undivided one-half interest in that part of the south half of private claim No. 1, on the north side of the river, located between the canal and river, (Transcript p. 384) the title to the other undivided one-half thereof being in Morgan L. Martin, and in 1859, said Improvement Company caused the said land owned by Martin and itself to be platted into mill lots, known as Jennie's plat, the up-stream lot being about 1100 feet and the lower lot about 2300 feet below the Government dam.

In August, 1866, plaintiff in error acquired all of the rights, franchises and property which had theretofore been owned and held by said Fox and Wisconsin Improvement Company. (Transcript pp. 92-94.)

The State, prior to its transfer of the improvement to the Fox and Wisconsin Improvement Company, had never used

or leased to be used, any water power incident to the improvement at Kaukauna, and prior to the lease of June 3, 1861, hereinafter mentioned, the bank of said canal had never been opened for hydraulic purposes. Subsequent to such transfer and up to November, 1880, the following are the only leases of water power which had been made by the Fox and Wisconsin Improvement Company or the Green Bay and Mississippi Canal Company at Kaukauna, and these were made to draw water for hydraulic purposes from the Government canal and to be used on lots in said Jennie's plat, viz: A lease from the Fox and Wisconsin Improvement Company and Morgan L. Martin to Cord and Gray, dated June 3, 1861, of 100 horse power, to be used on Lot 3 of Jennie's plat; a lease from the Green Bay and Mississippi Canal Company to Reuter Bros., dated about May 1, 1869, of 50 horse power, to be used on Lots 8 and 9 of Jennie's plat; a lease from the Green Bay and Mississippi Canal Company to Doane and Hoburg, dated Jan. 2, 1879, of 50 horse power, to be used on Lot 5 of Jennie's plat; and a lease from the Green Bay and Mississippi Canal Company to Oscar Byrns, dated October 1, 1880, of 30 horse power, to be used on Lot 1 of Jennie's plat, making a total of 230 horse power which had been leased on and prior to Oct. 1, 1880, to be drawn from the canal, to be used on Jennie's plat, and by reason of the difference in head between the two points being equal to about 154 horse power at the Government dam. (Transcript pp. 335, 365.)

By deed dated September 18, 1872, the Canal Company conveyed to the United States, all and singular, its property and rights of property in and to the line of water communication between the Wisconsin river and the mouth of the Fox river, including its locks, dams, canals and franchises, from which it excepted the ***water powers created by the dams.*** (Transcript p. 60.)

This exception was based upon the opinion of the Secretary of War, that such water powers were not needed by the Government, and his opinion was based upon the report of

Major Houston to General Humphreys, Chief of Engineers, and by him approved and transmitted to the Secretary of War. This report stated, the water power at Kaukauna covered by the arbitration to be 2500 horse power and was based upon the testimony of Morgan L. Martin before the arbitrators, to the effect that the Canal Company claimed to own at Kaukauna 2500 horse power, ***which was the water power at the dam.*** (See Green Bay and Mississippi Canal Company documents pp. 69-73.)

The conclusion to be drawn from all this is, that the water powers at Kaukauna covered by the Canal Company's exception in its said deed ***were only those created by the dam,*** which is in perfect harmony with the language of the exception in the deed, viz:" ***the water powers created by the dams.***" This also agrees with the testimony given in this case, that the water power created by the Government dam at Kaukauna is from twenty-four to twenty-five hundred horse power. (Transcript p. 279.)

This suit was commenced about November 30, 1886, and plaintiff in error served its original cross-complaint herein March 10, 1890, and the stipulation made between the parties that it should stand and be answered to as a cross-complaint was dated March 19, 1890. (Transcript pp. 61 and 62.)

The Kaukauna Water Power Company, at the time this suit was commenced, owned the lands bordering the south bank of the river from a point above the Government dam to slack water below the rapids, and in December and January, 1886 and 7, being within two months after the commencement of this suit and several years prior to the filing of said cross-complaint, it became the owner of the undivided three-fourths of said Island No. 1, of all of said Island No. 2, of a large undivided interest in said Island No. 3, subject to leases of a small part thereof, and of all the land bordering the shores of said Island No. 4, except about one-fourth undivided thereof owned by the plaintiff in error.

About the years 1875 and 1876, the United States built a new dam across the river at Kaukauna just below the old

dam, the south end of which was located upon said lot 5 and and 40 feet below the south end of the old dam, and the north end of which was located upon said fractional Section 24 and about 110 feet below the north end of said old dam. The distance from the upper end of Island No. 4 to the present Government dam at its center, running north and south, is about 542 feet, (Transcript p. 199) and the head of water sustained by said present dam is about 8 feet. (Transcript p. 360.)

The crest of the Government dam is lower than the walls of the canal, as was that of the old dam; so that so much of the flow of the stream as is not used for navigation must pass over the dam, and down the channel of the stream, over the rapids, and past the lower riparian proprietors, unless it is diverted for purposes other than the uses of navigation.

ARGUMENT.

Main Question.

Has plaintiff in error the right, as grantee of the State, to divert from the bed of the river and its several channels below the dam at Kaukauna the whole or any part of the surplus water in the pond created by said dam, not required for the purposes of navigation, by drawing the same from said pond through the Government Canal, or an independent canal, away from and below the lands of the defendants in error bordering said river and its several channels below said dam and using the same where and as it sees fit?

Rights of the State Incident to the Dam.

The State, as to the works of improvement and the waters of the river required for the purposes of navigation, sustained different relations and had different rights from those which it sustained and had to the *water powers* created by such works and *incident* thereto.

As to the first, its relations and rights were those of a sovereign. It could exercise the power of eminent domain in aid of the public improvement and could also divert to the public use so much of the water of the river as was necessary for that purpose.

As to the second, viz: the incidental water powers, its rights were only those of an owner or proprietor, wholly divested of any sovereign right or power, and were subject to the same limitations as would be those of an individual in like cases.

Smith vs. Rochester, 92 N. Y., 463–477 and 8.
Dermott vs. The State, 99 N. Y., 101, 107.

The dam in question was necessary in order to secure slack water at such level as would make the river navigable at and above the head of the rapids, and also to supply the canal leading therefrom with sufficient water to render it navigable and serve the purposes of navigation. To do this effectually it was necessary ***to obstruct the whole flow of the river from bank to bank by the dam,*** and therefore it was held in the former suit that the ***surplus water power*** created by this dam was appropriated by the State as incident to the right thus exercised of necessarily obstructing the whole flow of the stream for the public purpose, which surplus water power afterwards passed to the plaintiff in error.

The State acquired its title to this water power in its ***proprietary capacity only*** and it was just such a title as an individual owning both banks of the river, would have to the water power created by a dam constructed by him across the river from bank to bank and ***with the same limitations as to its use.***

The State Supreme Court in its opinion herein said upon this subject, (Transcript p. 544) "It is by no means clear that "this statute (referring to Section 16, Act of 1848, "above quoted), invested the State with a title more "absolute or with rights more extensive or exclusive in

"the water of the stream ***than would belong to the owner "of both banks of the stream who should have erected "the dam for the purpose of creating water power.*** Such "a private owner would own the water power created by "the dam absolutely and entirely, subject only to the "public right to divert the water required for navigation. ***"It is not easy of apprehension how the State could "acquire a title more ample."***

The private owner of such a dam and of the water power created thereby, under the ordinary rule governing the question, would be required to so use his right ***as that the water should be returned to the stream in such a manner and at such a place as not to deprive a lower riparian owner of its use as it had been accustomed to flow past his banks.***

The rule is stated in 3 Kent's Com. 439, as follows:

"Every proprietor of lands on the banks of a river "has naturally an equal right to the use of the water "which flows in the stream adjacent to his lands as it "was wont to run (***currere solebat***) without diminution "or alteration. No proprietor has a right to use the "water to the prejudice of other proprietors above or "below him, unless he has a prior right to divert it, or a "title to some exclusive enjoyment. ***He has no prop- "erty in the water itself*** but a simple usufruct while it "passes along. ***Aqua currit et debet currere ut currere sol- "ebat*** is the language of the law. Though he may use "the water while it runs over his land as an incident to "the land, he cannot unreasonably detain it, or give it "another direction, ***and he must return it to its ordinary "channel when it leaves his estate.*** Without the con- "sent of the adjoining proprietors, he cannot divert or "diminish the quantity of water which would otherwise "descend to the proprietors below, nor throw the water "back upon the proprietors above, without a grant or an

"uninterrupted enjoyment of twenty years, which is evi-
"dence of it."

The Kimberly & Clark Co. vs. Hewitt, 79 Wis., 334.
Tourtellot vs. Phelps, 4 Gray, 370.
Tyler vs. Wilkenson, 4 Mason, 397, 400.
Pratt vs. Lamson, 2 Allen, 275, 284 and 5.
Black's Pomeroy on Waters, Secs. 4 and 8.
Varick vs. Smith, 5 Paige Ch'y, 136.
S. C. 9 Paige Ch'y, 546.

The only right which the State had to the surplus water of the river at this dam, not required for the purposes of navigation, was to its use as it passed along. ***It had no right of property in the water itself,*** and therefore could not take exclusive possession of such water and divert it to such points or places as suited its pleasure or convenience. We then ask upon what theory or under what claim can it be said that the State as to the water power created by such dam, was invested "with rights more extensive or exclusive than would
"belong to the owner of both banks of the stream who
"should have erected the dam for the purpose of creat-
"ing water power."

If it was not, then it and its grantees, in their use of said water power, must be governed by the ordinary rule above stated regulating the use of the waters of streams by riparian owners with respect to the rights of one another.

It follows that plaintiff in error, as the owner of such water power, cannot in its use lawfully divert any of the surplus water in the pond sustained by said dam, away from and to the prejudice of the riparian owners upon the river below the dam. If it can lawfully do so it must be by some other right than as simple owner of such water power.

In ***Varick vs. Smith*** first reported, 5 Paige Ch'y, 136, and next 9 Paige Ch'y, 546, (see 559), a dam had been erected by authority of the State of New York, across a public stream,

to supply water to a state canal, under a statute which authorized the canal commissioners "to enter upon, take possession of and use all and singular any lands, waters and streams necessary for the prosecution of the improvements intended by the act," and which also authorized the commissioners to lease ***the surplus water created by any such works of improvement***. It will be observed that the language above quoted from the New York statute is almost identical with that of Section 15 of the Wisconsin Act of 1848.

The court held that a lease of the surplus water not needed for the canal to be drawn from the pond so that it should not pass in the original channels of the stream to the adjacent proprietor below, was absolutely void; that the State had no right to divert the surplus water of the stream not necessary for the canal and lease the same for private use, and that such act would be the taking of private property for a private use in violation of the Constitution. The opinions in this case are very clear and logical and have received the approval of many courts of high authority and have been disapproved by none.

Rights of the State Incident to the Canal.

The State, by its construction and use of the canal for the purposes of navigation, did not acquire the right to divert into and pass along the canal to be used for hydraulic power the surplus flow of the river obstructed by the dam.

(By ***surplus flow at the dam*** we mean the ***whole flow*** of the river at that point not required to be passed into and through the canal for the purposes of navigation, which by the undisputed testimony did not and does not exceed ***1,000 cubic feet per minute***, or one three-hundredths part of the flow of the river at an ordinary stage.)

(1) Such surplus flow at the dam was not incident to the canal for the public purpose for which it was constructed.

When the canal is filled from the pond and constantly supplied with sufficient water to make good the waste from leakage and lockage, the requirements of the canal for the public use are fully met. Any taking of water into the canal beyond this is not only detrimental to navigation, but a diversion of water ***solely*** for a private use, and wholly unauthorized by Section 15 of the act of 1848 above quoted.

(2) In order to pass such surplus flow through the canal and its locks as planned by the State and afterwards constructed, it would require a velocity of at least ***thirteen miles per hour.*** This is based upon the average flow of the river at an ordinary stage of water, viz: 300,000 cubic feet per minute, and a channel in the canal that would carry a body of water 52 feet in width and 5 feet in depth, which is one foot deeper than the specifications annexed to the Martin contract required.

Such a velocity of water in the canal would not only render it useless for the purposes of navigation, but would probably soon cut away the banks and sweep out the locks and wholly defeat the public purpose for which the canal was constructed. To draw any substantial part of the surplus flow of the river at the dam through the canal for use for hydraulic power would seriously ***interfere with, hinder and obstruct*** navigation in such canal. The testimony was that a velocity of 100 feet per minute, average flow, in a canal of this capacity was as great as should be allowed in the interest of navigation. (Transcript p. 391.) This would be a little over one mile per hour.

It is absurd to say that the State through the exercise of its soverign power in aid of a public right acquired a private right which if exercised would defeat, or at least injure, the public right.

(3) The capacity of the canal as planned and constructed was wholly inadequate to take the surplus flow of the river at the dam, or any substantial part of it, through it. This, coupled with the fact that the State never acquired any lands along the canal upon which to use water powers, and never

made any openings in the side of the canal through which to take water for such purpose, shows clearly that it was not the intention of the State to use the canal for hydraulic purposes, but to use it exclusively for and in the interest of navigation.

(4) The drawing of the surplus flow of the river through the canal for hydraulic power is an unwarranted and unlawful diversion from the riparian owners below the dam. It is the taking of their property, because not incident to but in derogation of the public improvement. It is the taking of their property for the sole purpose of creating a water power for private use, which is unlawful.

The claim of right to draw 299-300 of the ***whole flow of the river through the canal and use it for water power at any point on the canal or elsewhere as an incident to the necessary use of 1/300 of such flow in the canal for navigation*** has not the merit of having even a ***colorable device*** **in its support.**

This court, in ***Kaukauna Water Power Co. vs. Green Bay and Mississippi Canal Co.***, 142 U. S., 254, said at page 273: "It is probably true that it is beyond the competency "of the State to appropriate to itself the property of in- "dividuals for the sole purpose of creating a water power "to be leased for manufacturing purposes." And at page 275: "The true distinction seems to be between "cases where the dam is erected for the express or ap- "parent purpose of obtaining a water power to lease to "private individuals, or where in building a dam for a "public improvement ***a wholly unnecessary excess of "water is created,*** and cases where the surplus is a mere "incident to the public improvement and a reasonable "provision for securing an adequate supply of water at "all times for such improvement. * * * * So long "as the dam was erected for the ***bona fide*** purpose of fur- "nishing an adequate supply of water for the canal and "was not a colorable device for creating a water power, "the agents of the State are entitled to great latitude of

"discretion in regard to the height of the dam and the "head of water to be created."

The *adequate supply of water for the canal* in this case is one-third of one per cent. of the whole flow of the river. When that amount is supplied to the canal from the pond the surplus should be permitted to flow in the natural channels of the river so as to reach the lands of all riparian owners below the dam as it was wont to flow, being interrupted only by such lawful use thereof for water power as is created by said dam.

(5) The place where the surplus water created by the dam may be used for power is where it would run to waste if not used for navigation, *which is at the dam*. And as already said, the wants of navigation as to the canal are fully met when it is filled from the pond and kept supplied with sufficient water to make good the waste from leakage and lockage.

Canal as an Improvement for Navigation did not Create Water Power.

It is true as a physical fact that the canal sustains the water at such a level or head that if its banks were opened and the water permitted to pass through to a lower level it would produce power. But such a use of the canal is entirely *foreign to its purpose as an improvement for navigation* and tends to defeat such purpose. Therefore it does not create a water power within the sense intended by Section 16 of the Wisconsin Act of 1848. We quote from the opinion of Justice Newman herein at page 545 of Transcript:

"The first reach of the canal to the first lock did not "create a water power. No power existed there until "the bank of the canal was cut for the very purpose of "creating it. Until then all the water of the stream not "required for navigation passed over the dam. There "it created a power which was in a true sense incidental "to the erection of the dam. The power created by the

"cutting of the canal was not incidental to the erection "of the dam *or to the construction and use of the canal "for navigation,* but was *ex industria* for the purpose "of creating a water power. It was created for its own "sake and not incidentally. So far from being an in- "cident to the lawful public improvement, it is in deroga- "tion of the public improvement. It impedes rather "than aids the navigation of the stream."

☆

☆ This was a construction by the State Supreme Court of Section 16 of the Wisconsin Act of 1848, found at page 29 of this brief, to the effect that the *canal* as one of the *works of improvement* did not create a water power within the meaning of that section, *which construction is binding upon this court.* It was so held in *Kaukauna Co. vs. Green Bay &c. Canal Co.*, 142 U. S., 254, at page 274, where it was said that the construction given by the Supreme Court of Wisconsin to section 17 of said act of 1848 *was obligatory upon this court.* It necessarily follows that the construction given by the Supreme Court of the State to any other section of the act is *equally obligatory* upon this court. Under this construction the State acquired no water power as incident to the canal, and hence plaintiff in error acquired none.

to have a guard-lock at its mouth at the pond and near the end of the dam as a protection for this long line of the first reach of the canal.

(2) The purposes to be served by the dam proper and by the canal, including its first reach, were essentially different. The dam was to obstruct the whole flow of the river so as to effectually raise the water to a proper level for sup-

plying the canal and making it navigable. The canal in its first reach and throughout its entire length only obstructed a very small fractional part of the flow of the river and was a narrow artificial channel to be used for the purpose of floating boats and vessels around the rapids.

(3) We cannot do better than to quote the terse and clear language of Justice Newman relating to this question and found at page 546 of Transcript:

> "In some sense it may be said that the first reach of "the canal down to the first lock is a part of the dam. "Since the use of the guard-lock has been abandoned it "upholds the pond. In that sense it is a part of the dam. "But as bearing upon the question as to what rights are "incidental to the building of the dam proper it is a "perversion of terms and ideas. It is merely color to "cover the substraction of the riparian right to this pri- "vate use of the water of the stream."

Record in Former Suit an Estoppel upon Claim Now Made that Canal is a part of the Dam.

Plaintiff in error is estopped by the record of the former suit (142 U. S., 254), as to all parties here who were parties there, from now claiming that the first reach of the canal is a part of the dam, or in other words, from now claiming that said dam, pond and canal are in any wise different from what it alleged them to be in that record.

When the former suit was commenced the dam, pond and canal were the same and sustained the same relations to each other as they did when the present suit was commenced and as they do today. And the rights of plaintiff in error to the water powers created by said dam were the same then as they were when the present suit was commenced and as they now are. The proofs show this.

In a former part of this brief we have made quotations from the record in such former suit, showing that plaintiff in

error alleged therein that the dam extended only from Lot 5 on the south side of the river to fractional Section 24 on the north side of the river, and that the Government Canal commenced at the north end of said dam and extended down stream on the north side of the river; also that said plaintiff in error claimed to be the owner of and entitled to the exclusive use and control of the water power or hydraulic power supported, maintained and furnished by the ***said dam across Fox river***, subject only to the right of the United States Government to draw only so much water therefrom as was necessary to fill the canal on the north side of said river ***leading from the pond above said dam to the river below said dam*** for the purposes of navigation only. Issues were joined in said suit and, among other things, the alleged claim of ownership by plaintiff in error of the surplus water power created by said dam was denied. The suit proceeded to a final judgment upon such issues, by which it was determined that the plaintiff in error was the legal owner of the water power created by ***such dam*** over and above what was required for navigation, and which dam was described in said judgment as resting upon the south side of said river upon said Lot 5 and upon said fractional Section 24 on the north side of said river.

Plaintiff in error should then have brought forward its whole case and asserted all of its rights pertaining to the subject of the litigation; failing to do which it is estopped by said former judgment from now claiming them to be different or greater than it alleged them to be in said former suit.

The Vice-Chancellor in ***Henderson vs. Henderson***, 3 Hare, 100, see 115, states the English law on the subject, as follows:

> "I believe I state the rule of the court correctly when "I say that when a given matter becomes the subject of "litigation in, and of adjudication by, a court of com- "petent jurisdiction, the court requires the parties to "that litigation to bring forward their whole case, and "will not (except under special circumstances) permit

"the same parties to open the same subject of litigation "in respect of matter which might have been brought "forward, as a part of the subject in contest, but which "was not brought forward, only because they "have from negligence, inadvertence, or even ac- "cident, omitted part of their case. The plea of "***res judicata*** applies, except in special cases, not only "to points upon which the court was actually re- "quired by the parties to form an opinion and pro- "nounce a judgment, but to every point which properly "belonged to the subject of litigation, and which the "parties, exercising reasonable diligence, might have "brought forward at the time."

The rule as to what constitutes an estoppel by the record, is clearly and forcibly stated by Lord Ellenborough in the case of ***Outram vs. Morewood***, 3 East, 346, at page 355, as follows:

"And it is not ***the recovery, but the matter alleged*** by "the party, ***and upon which the recovery proceeds***, which "creates the estoppel. The recovery of itself in an action "of trespass is only a bar to the future recovery of damages "for the same injury; but the estoppel precludes parties "and privies from contending to the contrary of that "point, or matter of fact, which, having been once dis- "tinctly put in issue by them, or by those to whom they "are privy in estate or law has been, on such issue joined "solemnly found against them."

The language of Dixon, C. J., in the case of ***Board of Supervisors vs. Mineral Point Railroad Co. and others***, 24 Wis., 93-124, a suit in equity, was:

"The decree is the response of the law to the facts "charged in the pleadings; and to ascertain what those "facts were and how they were decided, recourse must "be had to the pleadings. It is interpreted by the plead- "ings and is understood as necessarily affirming every "fact requisite to its correctness and validity. It is "therefore ***res adjudicata*** and an estoppel upon every

"such fact. In the language of the brief of counsel in "this case, every point which has been either expressly "or by necessary implication in issue and has been de- "cided, or which must necessarily have been decided, "in order to support the judgment or decree is con- "cluded."

The court cited numerous authorities at page 125, among which was ***Borngesser vs. Harrison***, 12 Wis., 544. In that case it was held that a party who had brought suit on an account for only a part of his demand, was thereby barred from maintaining an action for the balance of the same account. This latter authority is peculiarly applicable to the case at bar.

In ***Kaehler vs. Dobberpuhl***, 60 Wis., 256, 262, it was held that the plaintiff in an action at law was barred from maintaining the action because the claim might have been made in a proceeding for contempt against the defendant.

The Court say: "It is true that any right which the "plaintiff might have to bring any future action for the "property is reserved, but the plaintiff might in that pro- "ceeding have obtained full and complete indemnity, if "she was entitled to any, and that proceeding and judg- "ment are as much a former recovery and bar to this ac- "tion as if she had done so. Her damages by reason of "this alleged wrongful taking of her property in viola- "tion of the injunction are ***indivisible***, and if she has pro- "ceeded in that way, and by such a remedy, which is "ample and adequate to obtain only a part when she "could as well have recovered the whole of her damage, "the former recovery as a bar, is just as complete as if "she had recovered all. It is true this defense was not "pleaded, but the evidence was introduced without ob- "jection which establishes such a defense, and should "have had effect in a direction to the jury as requested "by the defendant. This principle has often been es- "tablished by the decision of this court." (Citing sev- eral cases.)

The estoppel claimed is not rendered ineffectual by the fact that there are parties to this suit, who were not parties to the former suit.

Thompson vs. Roberts, 24 How. (U. S.), 233.

No Rights by Prescription or Limitation.

Plaintiff in error has utterly failed to show that it has acquired the right, either by prescription or limitation, to divert the whole or any part of the water power furnished by the dam away from the lands of the defendants, through the Government Canal or otherwise, and to use the same upon lots in Jennie's Plat at points from 1,200 to 2,000 feet below said dam.

In the fourth subdivision of its cross-complaint (Transcript p. 101) it alleged as a further defense in bar and by way of limitation that by itself and its tenants it had used about one-quarter of the water power furnished by said dam upon the south or upper half of private claim No. 1, at points from 1200 to 2000 feet below the Government Dam, continuously, and under claim of right and title so to use the same, for more than twenty years prior to the commencement of this action, and that it had so used a still larger amount, more than one-half thereof, for more than two years prior to the commencement of this action.

The facts fail to sustain these allegations.

This suit was commenced about *Nov. 30, 1886*, and said cross-complaint was served *March 10, 1890*.

The proofs show that the first use or attempted use of water power from the Government Canal upon Jennie's Plat was a lease dated *June 3, 1861*, and given by the Fox and Wisconsin Improvement Company and Morgan L. Martin to Cord & Gray for 100 horse-power. *This was the only lease of water power to be used from the canal upon Jennie's Plat given more than twenty years before the commencement of this suit or the service of the cross-complaint.* From

May 1, 1869, to Oct. 1, 1880, inclusive, three other leases were executed by the plaintiff in error of water power to be used from the canal upon Jennie's Plat, aggregating 130 horse-power. It is therefore clear upon the proofs that not more than 100 horse-power of water had been used from the canal upon Jennie's Plat for more than twenty years prior to the commencement of this suit, and this was not so used under a claim of right adverse to the defendants. From about 1855 up to September 18, 1872, the date of the deed from plaintiff in error to the United States, plaintiff in error and its grantor, the Fox and Wisconsin Improvement Company, had owned that part of fractional Section 24 bordering the north shore of the river and also the undivided one-half of that part of private claim No. 1 bordering said north shore. Therefore, up to the date last named, it was a tenant in common with the owners of the south shore as to that part of the river located below the dam and above the head of Island No. 4, and was also a tenant in common with others as to the ownership of the several channels in the river below the head of Island No. 4.

Prior to 1880 there were no water power improvements below the dam and no water powers used, except as to the small amounts leased as above stated to be used from the canal upon Jennie's Plat. The said leasing and use thereof by the plaintiff in error up to the year 1880 was as tenant in common with others upon the river, and by the use of structures which were within the limits of its own estate, or which at least did not invade the estate of the other tenants in common. It was therefore ***not an adverse use under a claim of exclusive right or title.***

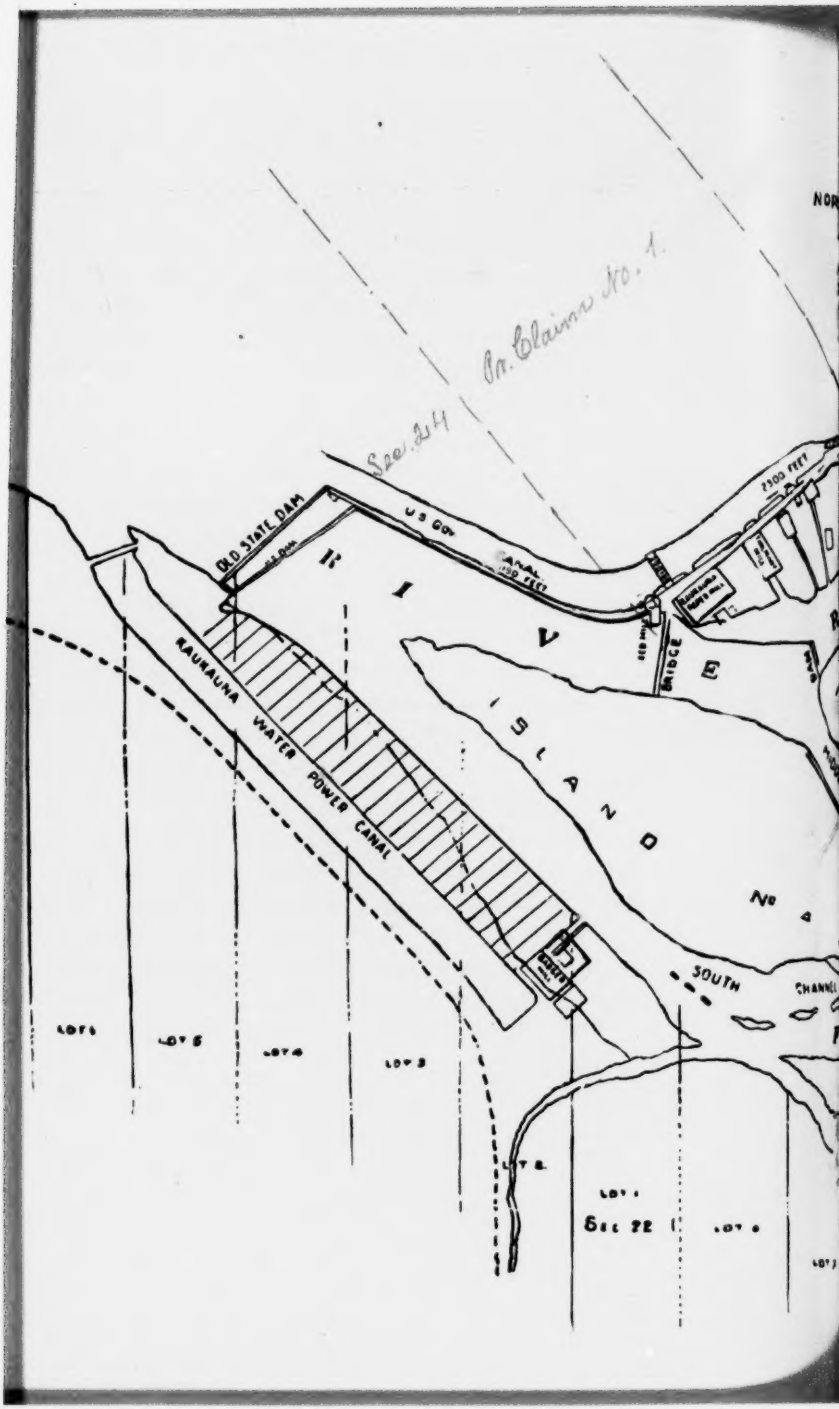
In Pratt vs. Lamson, 2 Allen's Reports, 275, 288, Merrick, J., states the rule as follows: "But where a proprietor of "land upon one shore appropriates and applies to his in- "dividual use so much of the passing water as he is en- "abled to do, even if it be ***the whole of it***, by means of "structures erected upon and within the limits of his "own estate, and the proprietor of the land on the op-

"posite shore neither uses nor seeks to use, nor makes "any provision, nor has any occasion, for the use of any "part of the stream or proportion of the water to which "he is entitled, there is nothing adverse in the action of "the former. He does nothing for which an action can "be maintained against him, or nominal damages re- "covered in the assertion and vindication of an invaded "right. In such circumstances, they stand towards each "other in the relation and with substantially the rights of "tenants in common, where the possession of one is "deemed to be the possession and for the benefit of all; "and their respective rights will continue to be protected "and preserved to them, until some positive act of actual "and exclusive adverse possession by which one of the "parties is directly interfered with, and prevented from "enjoying his equal privilege in the use of the water."

In support of this point we quote the language of Justice Newman in his opinion herein: (Transcript p.546.) "There "seems to be no sufficient ground for holding that the "respondent has acquired additional right by prescrip- "tion. Twenty years before the commencement of the "action it had diverted and was diverting only a small "part of the water of the stream. The amount diverted "was inconsiderable. It was no such 'strong act of ex- "clusive possession' as that it was ***per se*** notice of an "adverse claim of right."

We respectfully submit that the judgment of the State court is right and should be affirmed by this court if it retains jurisdiction of the case.

JOHN T. FISH,
ALFRED L. CARY,
Counsel for said Defendant in Error.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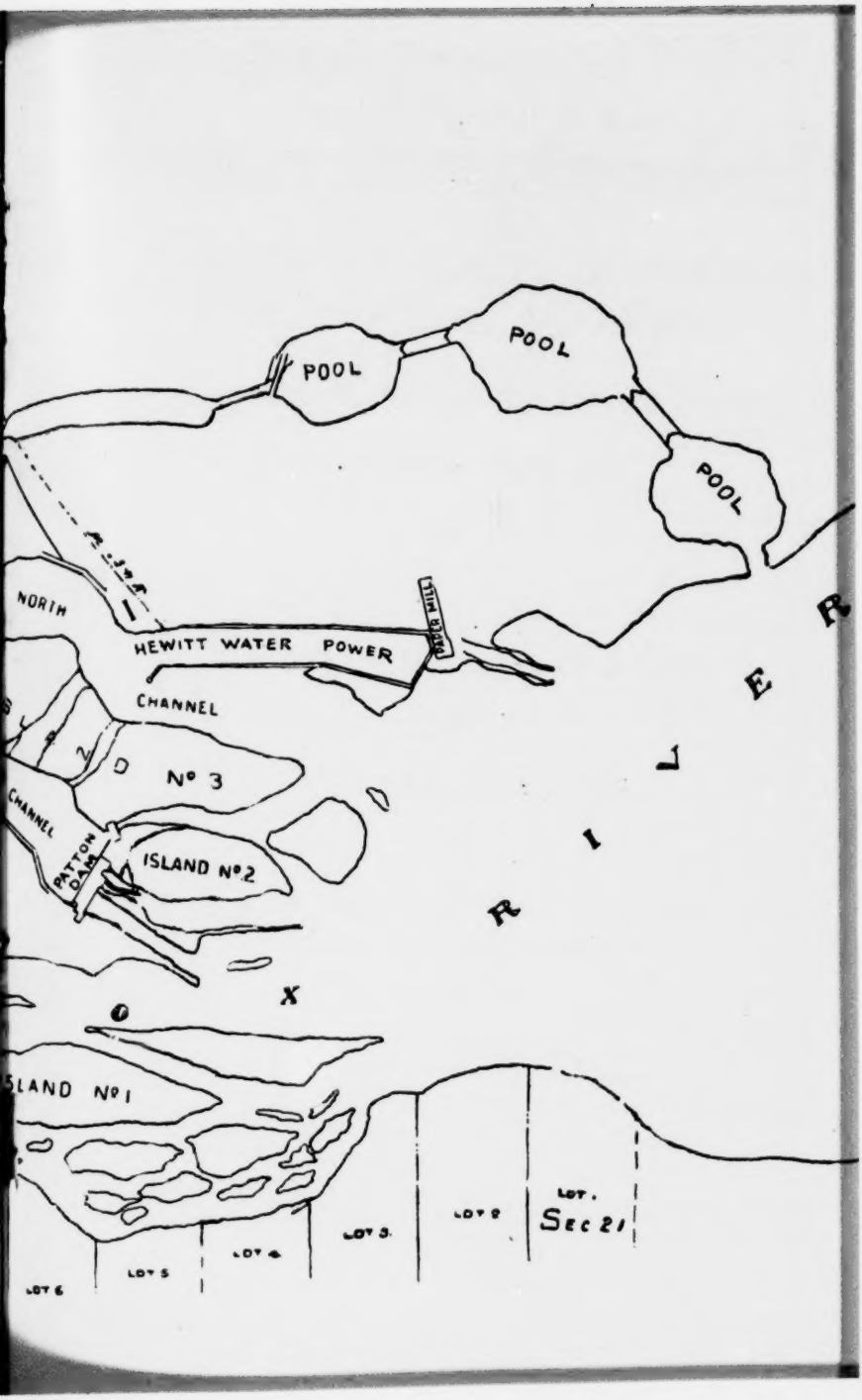
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